

No. 87-168-AFX
Status: GRANTED

Title: Russell Frisby, et al., Appellants
v.
Sandra C. Schultz and Robert C. Braun

Docketed:
July 28, 1987

Court: United States Court of Appeals
for the Seventh Circuit

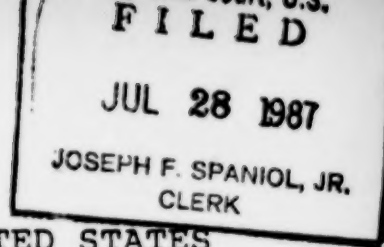
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NOTE* Notice of Appeal filed 7/16/87

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1987	G	Statement as to jurisdiction filed.
3	Aug 6 1987		Order extending time to file response to jurisdictional statement until September 16, 1987.
4	Sep 16 1987		DISTRIBUTED. October 9, 1987
5	Sep 18 1987	X	Motion of appellees Sandra C. Schultz, et al. to affirm filed.
7	Dec 16 1987		REDISTRIBUTED. January 8, 1988
8	Jan 11 1988		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. *****
9	Feb 8 1988		Record filed.
		*	Certified copy of original record and C.A. proceedings received.
10	Feb 12 1988		Record filed.
		*	Certified copy of original record received.
12	Feb 22 1988		Joint appendix filed.
13	Feb 22 1988		Brief of appellants Russell Frisby, et al. filed.
11	Feb 23 1988		Brief amicus curiae of Pacific Legal Foundation filed.
14	Feb 25 1988		Brief amici curiae of National League of Cities, et al. filed.
15	Feb 25 1988		Brief amicus curiae of Natinal Institute of Municipal Law Officers filed.
16	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 20, 1988. (3rd case).
17	Mar 25 1988		CIRCULATED.
18	Mar 25 1988	X	Brief amicus curiae of AFL-CIO filed.
19	Mar 25 1988	X	Brief amici curiae of Rutherford Institute, et al. filed.
22	Mar 25 1988	X	Brief of appellees Sandra C. Schultz and Robert C. Braun filed.
20	Mar 26 1988	X	Brief amici curiae of ACLU, et al. filed.
21	Mar 26 1988	X	Brief amici curiae of American Life League, Inc., et al. filed.
23	Apr 9 1988	X	Reply brief of appellants Russell Frisby, et al. filed.
24	Apr 20 1988		ARGUED.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

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v.

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Appellees.

On Appeal From the United States Court
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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether § 9.17 of the Town of Brookfield General Code, prohibiting picketing in residential areas, is a reasonable regulation of speech in a limited public forum.

2. Whether the ordinance is a constitutional time, place and manner regulation of speech in a full public forum.

PARTIES

Other defendants below and appellants in this Court are George H. Hunt, Robert Wagowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield.

The other plaintiff below and appellee in this Court is Robert L. Braun.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment order of the Seventh Circuit Court of Appeals (App. A, A-1) is unreported. The opinion of the District Court for the Eastern District of Wisconsin (App. C, A-3) is reported as Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985).

JURISDICTION

This is an appeal from a judgment order of the Seventh Circuit Court of Appeals dated April 30, 1987, that affirmed the judgment of the District Court for the Eastern District of Wisconsin and remanded the case to that court. Jurisdiction in the court of appeals was based on 28 U.S.C. § 1292(a)(1). The district court order was filed on October 7, 1985. Jurisdiction in that court was based on 28 U.S.C. § 1343. The district court granted a preliminary injunction enjoining appellants from enforcing an ordinance of the Town of Brookfield because the ordinance was likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum (App. C, A-22). A panel of the appellate court originally heard the case and issued an opinion reported at 807 F.2d 1339 (7th Cir. 1986). The court then vacated that opinion and granted a rehearing en banc.

Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987) (App. B, A-2). After rehearing, the court by an evenly divided court affirmed the district court order without opinion. (App. A, A-1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2), because the district court found the ordinance was likely to be found unconstitutional. A municipal ordinance is considered a state statute for the purposes of 28 U.S.C. § 1254(2). City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).

A notice of appeal to this Court (App. D, A-24) was filed on July 16, 1987 with the clerk of the Seventh Circuit Court of Appeals and the clerk of the District Court for the Eastern District of Wisconsin.

CONSTITUTIONAL AND ORDINANCE PROVISIONS

The first amendment to the United States Constitution provides in pertinent part:

Congress shall make no law
... abridging the freedom of
speech . . .

U.S. Const. amend. I.

The fourteenth amendment to the
United States Constitution provides in
pertinent part:

No State shall make or enforce any
law which shall abridge the
privileges or immunities of citizens
of the United States . . .

U.S. Const. amend. XIV, § 1.

Section 9.17, General Code, Ordi-
nances of Town of Brookfield provides in
pertinent part:

(2) PICKETING RESIDENCE OR DWELLING
UNLAWFUL. It is unlawful for any
person to engage in picketing before
or about the residence or dwelling of
any individual in the Town of
Brookfield.

Town of Brookfield, Wis., General Code,
Ordinances § 9.17 (1985). Appendix E
(A-26) sets forth the entire text of the
ordinance.

STATEMENT OF THE CASE

Between April 20 and May 20, 1985, appellees Sandra Schultz and Robert Braun, together with groups of other antiabortion demonstrators, picketed the home of Dr. Benjamin Victoria. Dr. Victoria apparently performs abortions as part of his medical practice in the cities of Appleton and Milwaukee. The groups of picketers ranged in size from eleven to more than forty persons, and they picketed on at least six different occasions during the one month-period.

Dr. Victoria's home, at 750 North Briarridge Drive, is in the Black Forest Subdivision of the Town of Brookfield, Wisconsin. The zoning in the subdivision is exclusively single family residential. All of the residential streets in Brookfield are approximately thirty feet wide, sufficient for one vehicle in each direction; there are no sidewalks.

The Town of Brookfield is a residential suburb of the City of Milwaukee. It has a population of approximately 4,300 persons, and an area of 5½ square miles. Considerable business and commercial development is clustered along West Bluemound Road (State Highway 18); the remainder of the Town is residential.

The picketing spawned numerous complaints and reports to the town's police department. On May 7, 1985, the Brookfield Town Board enacted an ordinance that prohibited all picketing in residential areas except labor picketing. The ordinance never was enforced because appellant Town Attorney Clayton Cramer determined that it was probably unconstitutional under Carey v. Brown, 447 U.S. 455 (1980). The Town Board repealed the ordinance and passed, on May 15, 1985, a substitute ordinance that declared simply, "[i]t is unlawful for any person to engage in picketing before or about the residence

or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., General Code, Ordinance § 9.17 (1985) (App. E, A-28). Appellees have refrained from picketing since the effective date of the ordinance, May 21, 1985.

Appellees Schultz and Braun filed a complaint under 42 U.S.C. § 1983, seeking declaratory and preliminary and permanent injunctive relief from an alleged deprivation of their rights under the first and fourteenth amendments of the United States Constitution. The district court heard appellees' motion for a preliminary injunction on August 13, 1985. Appellants argued in their brief that the ordinance is content-neutral and was enacted to promote the Town's interests in preserving the tranquility and privacy of the home and neighborhood, as well as public safety. The district court granted a preliminary injunction on October 7, 1985 (App. C, A-22). The court held that the

ordinance was likely to fail the test of a constitutional time, place and manner regulation of speech in a public forum, and its order provided that the preliminary injunction would become permanent if the Town did not appeal and if neither party requested a trial within sixty days. (App. C, A-23).

Appellants appealed to the Seventh Circuit Court of Appeals, and argued in their brief that the ordinance does not violate the first and fourteenth amendments of the Constitution because it is a content-neutral, time, place and manner regulation; it is narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels of communication. A panel of the Court of Appeals heard the case on April 9, 1986. The court granted appellants' motion for rehearing, and the full court heard the case on April 29, 1987. The decision and order of the court of

appeals affirmed the district court order by an evenly divided court without opinion and remanded the case for any further proceedings deemed necessary. (App. A, A-1).

THE QUESTION IS SUBSTANTIAL

The district court granted, and the appellate court affirmed, a temporary injunction preventing the Town of Brookfield from enforcing an ordinance that would protect its residents from the loss of safety and privacy caused by picketers outside their homes. The court determined that the ordinance was likely to violate the first and fourteenth amendments of the Constitution. Because of the significance of the question, resolution by this Court is appropriate.

In addition, a similar ordinance has been upheld by the Tenth Circuit Court of Appeals in Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974) cert. denied 421 U.S. 971 (1975). That court held that the anti-residential picketing ordinance was a

valid exercise of governmental power to insure the privacy and tranquility of the town's residents. 507 F.2d at 545. The Seventh Circuit's decision in this case, and the Eighth Circuit's decision in Pursley v. City of Fayetteville, No. 86-1332 (8th Cir. filed June 10, 1987), directly contradict the Garcia holding. Resolution by this Court therefore is necessary, especially in light of the fact that the court of appeals affirmed the district court's order by an evenly divided court and without issuing an opinion.

It is well settled that picketing is the type of conduct that may be regulated in a reasonable manner by a municipality. See Cox v. Louisiana, 379 U.S. 536, 581 (1965). "[T]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey v. Brown, 447 U.S. 455, 471 (1980). Depending on the status of

the forum in which the speech takes place, a regulation such as Brookfield's, in order to be constitutional, must be a reasonable time, place, and manner restriction of speech in a full public forum, id. at 470, or must be reasonable in light of the purpose of the "limited" public forum. Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 47 (1983). Appellants contend that the Brookfield residential picketing ordinance meets both tests, and the district court erred in enjoining its enforcement.

I. The Ordinance Is A Reasonable Regulation Of Speech In A Limited Public Forum.

The district court, in summarily granting what in effect is a permanent injunction, invited no argument upon the question of whether the residential streets of the Town constituted a traditional, full, public forum, but instead merely assumed that they did. That assumption is based upon the

conclusion that "streets . . . 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Hague v. CIO, 307 U.S. 496, 515 (1939); quoted in Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Appellants, however, submit with all due respect that the question is not sufficiently addressed by this statement.

It is submitted that the question of the actual forum status of a given residential street or cul-de-sac has never been precisely presented to this Court. That argument is now advanced. Perry acknowledged that the very existence of the right to access to public property, and the standard by which limitations on such right must be evaluated, differed depending on the character of the property

at issue. 460 U.S. at 44. Brookfield submits that its residential streets are not traditional or dedicated, full, public fora for all forms of expression.

The district court applied the 'full-forum' test, mentioned in Perry and and discussed infra, to the ordinance. Perry also noted an alternative status of a "limited" public forum, however. Id. at 47. It is submitted that, at most, Brookfield's residential streets constitute only a limited public forum. In the case of a limited forum, the standard for evaluating a regulation that limits speech is whether it is 1) reasonable, and 2) not an effort to suppress expression just because the public officials oppose the speaker's views. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 806 (1985); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984).

It has never even been established in this case that the residential streets in question are owned by the government.

However, this Court has:

recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Perry, 460 U.S. at 46 (citations omitted).

The residential streets in question have never been held open to all members of the general public to congregate upon, regardless of their own place of residence and lack of business or social purpose for being there. Hence, the inquiry must turn to whether such strangers are allowed to enter and remain for the precise purpose of picketing. In this regard, it is

observed that the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum. Perry, 460 U.S. at 49, n.9.

In Cornelius, this Court viewed the relevant forum as a charity drive, rather than the governmental premises upon which it was held. 473 U.S. at 801. The principle thus appears to be that the relevant forum involves participation in a certain activity rather than merely the place in which it transpires. This more openly explains the basis for the forum analysis in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), wherein in determining whether a forum exists, the court examined whether a particular form of expression is inappropriate for, or incompatible with, the character of the property and its intended use. Id. at 773. Thus, in that case it was held that public areas in a

commuter train station did not constitute a public forum. Id. Likewise, in Trenouth v. United States, 764 F.2d 1305 (9th Cir. 1985), the court held a truck parking area not to be a public forum. Id. at 1309.

As this 'activity' analysis has been applied most analogously to date, Pennsylvania for Jobs & Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984), held that door-to-door canvassing of private homes is plainly not a public forum. Id. at 187. "Indeed, the Supreme Court has noted that, because of the countervailing privacy interests of householders, [o]f all the methods of spreading unpopular ideas, house to house canvassing seems the least entitled to extensive protection." Id. at 186 (citations omitted). Because of identical privacy interests of householders here, and of their interests in safety as well, residential picketing is likewise least entitled to extensive protection as speech.

Most directly, ACORN v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986), held streets not to be a traditional public forum for purposes of soliciting donations. Id. at 871. The court held that, given traffic considerations, a forum did not exist in an intersection. Id. The court observed that "[t]he cases cited . . . refer to 'streets' as public forums, typically in the context of sidewalks and other locales traditionally reserved for public communication." Id. at 870 (emphasis supplied). It should be observed again that the residential streets here have no sidewalks, nor any area at all "traditionally reserved for public communication."

Likewise, this Court in Members of the City Council v. Taxpayers for Vincent held that sidewalks, crosswalks, curbs, lampposts, hydrants, trees, shrubs and other various items of public property in public rights of way did not constitute a

public forum at all. 466 U.S. at 814. In examining the matter, the Court noted the city's power to improve its appearance, and stated that "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." Id. Here, as well, Brookfield retains its right to provide for residential privacy, tranquility and safety, goals submitted to be more fundamental than aesthetic. Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for that purpose. Cf. Student Coalition for Peace v. Lower Merion School Dist., 596 F. Supp. 169 (E.D. Pa. 1984).

Because no traditional picketing forum thus exists, the applicable standard of review of the anti-residential picketing ordinance herein is whether it is 1) reasonable; and 2) not an effort to

suppress expression just because the public officials oppose the speaker's view. The latter is clear and, indeed, no such animus was alleged here. As to reasonableness, it is submitted on the strength of the foregoing facts and argument and the following observations that the regulation was not only reasonably authorized by the circumstances, it was absolutely required. Under this test, there is no requirement that restrictions of access be narrowly tailored or that the government's interest be substantial although, as will be seen infra, both were the case here.

II. Assuming Brookfield's Residential Streets Constitute a Full Public Forum, The Ordinance Is A Constitutional Time, Place And Manner Regulation Of Speech.

A time, place, and manner regulation of speech in a public forum, such as a public street, must pass the test laid out in Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37

(1983), to be constitutional. The regulation must be 1) content neutral, 2) designed to advance a significant governmental interest, 3) narrowly tailored to promote that significant governmental interest, and 4) leave open ample alternative channels of communication. Id. at 45.

The Ordinance is Content Neutral

The district court correctly concluded that the ordinance is content neutral. See App. C, A-17. The ordinance bans picketing in residential areas to promote any point of view. An earlier version of the ordinance would have barred all residential picketing except labor picketing, but that version was repealed based on this Court's decision in Carey v. Brown. In that case, the Court held that a residential picketing ordinance that excepted labor picketing violated the equal protection clause of the Constitution, although the Court expressly

reserved judgment in regard to the constitutionality of legislation prohibiting all residential picketing. 447 U.S. at 458, in footnote 2.

The Ordinance Promotes Significant
Governmental Interests

The interests the Town of Brookfield seeks to advance by the ordinance are public safety and privacy. See App. E, A-26, A-27. These are significant interests, as the district court correctly concluded. Maintaining the safety of public streets is clearly one of the responsibilities of a municipality. Streets in residential Brookfield are only thirty feet wide, and there are no sidewalks. Picketers walking on the street undoubtedly place themselves in danger from passing vehicles. This would be particularly true if, as in this case, the picketers parked cars and buses on the street. Other pedestrians using the street also would be endangered because

drivers would become distracted by the picketers. Vehicular traffic would be interfered with as well.

Brookfield's restriction of picketing on residential streets is intended to prevent these problems and aid in carrying out the Town's duty. Even in traditional public forums, restrictions on speech are permitted to promote public safety. In Cox v. Louisiana, 379 U.S. 536 (1965), this Court stated that a restriction to control travel on public streets, "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection." Id. at 557.

An equal, if not more important, government interest the ordinance seeks to advance is privacy. The district court correctly found that protecting the

privacy of the home is a significant enough interest to justify regulation of speech. See App. C, A-18. This Court has recognized that:

[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual to "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick."

Carey v. Brown, 447 U.S. at 471 (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

The Ordinance is Narrowly Tailored

In contrast to its findings on the issues of content neutrality and significance, the district court erred in its determination that the ordinance is not narrowly tailored. The district court did not specify the standard it used in analyzing this element, but the correct standard was articulated by this Court in

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In its analysis of the constitutionality of a city ordinance that prohibited posting signs on public property, this Court stated that "the city did no more than eliminate the exact source of the evil [visual blight] it sought to remedy." Id. at 808. The Court contrasted the ordinance with the one found unconstitutional in Schneider v. State, 308 U.S. 147 (1939), which prohibited all handbilling on streets as a way to reduce litter:

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In Schneider, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil - visual blight - is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to Schneider, therefore, the application of the ordinance in this case responds

precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.*

Brookfield's ordinance likewise "curtails no more speech than is necessary to accomplish its purpose." The evils the Town is attempting to prevent are unsafe streets and invasion of residential privacy. The medium of expression --

* The Seventh and Eighth Circuit Courts of Appeals have adopted a different standard in analyzing the "narrowly tailored" element of the test of a time, place and manner regulation of speech. Those courts require that a regulation be the "least restrictive" means of restricting speech that will serve the governmental objective. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___ U.S. ___, 107 S. Ct. 919, 920 (1987); Association of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983). However, this Court has stated that "[t]he less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation." Regan v. Time, Inc., 468 U.S. 641, 652 (1984); see also City of Watseka v. Illinois Public Action Council, ___ U.S. ___, 107 S. Ct. 919, 920 (1987) (White, J., dissenting).

picketing -- creates these evils, as discussed supra. Picketing is not defined in the Brookfield ordinance, but a generally accepted definition is: "to walk or stand in front of as a picket" Websters Third International Dictionary 1710 (1961). A "picket" is defined as "a person posted by a labor organization at an approach to the place of work affected by a strike . . .; also: one posted similarly in a demonstration as a protest against a policy of government." Id. See also 48A Am. Jur. 2d Labor and Labor Disputes § 2051 (1979). Persons engaged in this sort of activity in residential areas, especially where there are no sidewalks, create a threat to safety and an invasion of the privacy of homes.

The amount of speech curtailed is small; only picketing is prohibited, while many other forms of expression, as discussed infra, are allowed. The complete

ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of those whose home is being picketed:

Unlike sound trucks, it is not just the distraction of the noise which is in issue - it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in Wauwatosa v. King, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971):

"To those inside . . . the home becomes something less than a home when and while the picketing . . . continues[s]. . . . [The] tensions and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility."

Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a stranger lurks outside our home.

Carey v. Brown, 447 U.S. at 478-79 (Rehnquist, J., dissenting). Furthermore, even a single picket could distract motorists and be a hazard to himself and others.

The district court suggested that the ordinance could be narrowed by limiting the time during which picketing could occur, or by placing a seasonal restriction on the activity. (App. C, A-19). Privacy and safety would suffer no matter what time of day the picketing occurred, however. In addition, ordinances restricting the time during which speech activities can be carried out in neighborhoods have been found unconstitutional. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986) aff'd, ___ U.S. ___, 107 S.Ct. 919, 920 (1987) (ordinance limiting door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m. Monday through Saturday unconstitutional); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1259 (7th Cir. 1985) (ordinance prohibiting door-to-door soliciting between 8:00 p.m. and 8:00 a.m. unconstitutional as applied to the hour between

8:00 p.m. and 9:00 p.m.). A seasonal restriction also would not advance Brookfield's interests sufficiently. While picketing could be more dangerous during the winter, it would be more disruptive of tranquility during the summer.

Finally, the Town of Brookfield has the responsibility to protect its citizens from unwanted and dangerous intrusions into their lives. "It is the [municipality], not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution." Carey v. Brown, 447 U.S. at 478 (Rehnquist, J., dissenting). The Town has determined that a ban on residential picketing is the only way to protect the safety and privacy of its citizens, while still allowing the protesters other methods of expressing their views.

The Ordinance Leaves Open Ample
Alternative Channels of Communication

The final element of the four-part test of a time, place, and manner regulation requires that there be ample alternative channels of communication. The district court did not determine whether this element had been met, because of its decision that the ordinance was not narrowly tailored. Nevertheless, appellees here do have ample alternative means in which to communicate their message to the public.

The ordinance prohibits only picketing, defined as standing or patrolling, in residential areas of Brookfield. Protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching, see Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). They may go door-to-door to proselytize their views. They may distribute literature in this manner, see Martin v. City of

Struthers, 319 U.S. 141, 143 (1943), or through the mails. They may contact residents by telephone, short of harassment. They are barred only from picketing there, due to the uniquely invasive and potentially dangerous nature of that particular conduct.

Appellees in this case have not shown that they have a particular need to picket in residential areas. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) ("nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication . . ."). They may picket or engage in other forms of peaceful protest in commercial areas of Brookfield and in parks. "[W]hen speech interests are countered by other substantial governmental interests the availability of another forum is a highly relevant factor in determining the appropriate balance. See

Pell v. Procunier, 417 U.S. 817, 823-24 (1974)." Carey v. Brown, 447 U.S. 482, n.3 (Rehnquist, J., dissenting). Appellees have ample alternative methods and forums for communicating their views.

III. The Ordinance is Not Overbroad.

The district court did not reach the alternative argument of appellees that the residential picketing ordinance is unconstitutionally overbroad. Nevertheless, it is appropriate to discuss that argument in general defense of the constitutional validity of the ordinance.

This Court has stated that, particularly if conduct and not merely speech is involved, "the over-breadth of a statute must not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Members of the City Council v. Taxpayers v. Vincent, 466 U.S. at 799-801; New York v. Ferber, 458 U.S. 747, 770-71 (1982). "[T]he mere fact that one can conceive of some impermiss-

able applications of a statute is not sufficient to render it susceptible to an over-breadth challenge." Vincent, 466 U.S. at 800. Moreover, ordinances and statutes "should not be deemed facially invalid unless [they are] not readily subject to a narrowing construction by the state courts." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

No doubt one could imagine an application of Brookfield's antiresidential picketing ordinance that would be an impermissible restriction of speech. The Eighth Circuit Court of Appeals in Pursley v. City of Fayetteville, No. 86-1332 (8th Cir. filed June 10, 1987), however, did just that when it examined an ordinance similar to Brookfield's, and determined that it was overbroad. Id., slip op. at 10. The court stated that because residences are "often located close to the hubbub of daily commerce," the ordinance, which prohibited demonstrations and

picketing "before or about the residence or dwelling place of any individual," could prohibit picketing in busy commercial areas. Id. According to the court, this result would not affect the city's goals. Id.

The Eighth Circuit failed to consider the possibility of a state court narrowing the construction of the ordinance if a situation ever arose that required such action. See id. at 15 (Gibson, J., dissenting). The Brookfield ordinance also could be narrowed by a state court if necessary. However, any narrowing of the ordinance as it is written, for example by limiting the number of picketers or the time of picketing, would not advance Brookfield's legitimate goals of protecting the safety and privacy of Brookfield residents, as discussed earlier.

SHOWING AS TO ABUSE OF DISCRETION

Appellants submit that because of the final nature of the district court's order and because of its errors of law, this Court is not constrained to reviewing the district court's decree granting a preliminary injunction only for abuse of discretion, but may review the case on the merits. The district court's order of preliminary injunctive relief was designed to ripen into a final disposition, by becoming permanent, in the absence of an appeal and a request for trial within sixty days (App. C, A-23). The court was willing to allow a permanent injunction to come into being without conducting a full trial. Indeed, it would appear that most, if not all, available evidence was before the court by way of documents and affidavits at the hearing for a temporary injunction. There are no additional issues that the court need consider. In Jackson County v. Jones, 571

F.2d 1004 (8th Cir. 1978), the court held that an appeal of a preliminary injunction should be considered by the appellate court on the merits because the district court considered the matter on the basis of all available evidence; there was no reasonable likelihood that further evidence could be addressed at full trial on the merits; and it was readily apparent that the decision would, for all practical purposes, end the case. Id. at 1007. See also Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F.2d 468, 471 (2d Cir. 1980). An identical situation exists here. No purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction.

In this case virtually all of the facts were undisputed. Hence, the decision of the district court is based on points of law. Because error therein is the subject of appeal here, no deference

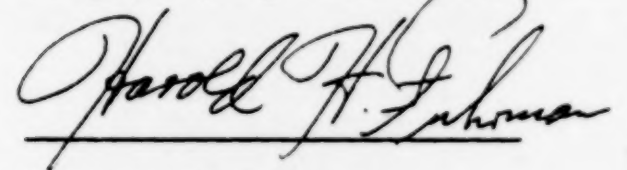
to the trial court's discretion is required. "[I]f the lower court's decision rests on an interpretation of the law rather than on the facts, the appellate court is not as limited in its review and may reverse if it feels that the lower court's view of the law was erroneous."

11 C. Wright & A. Miller, Federal Practice and Procedure § 2962 at 636-7 (1973) (footnotes omitted). Error in discerning the law and/or applying it simply constitutes whatever excess or abuse of discretion is unquestionably the proper subject of review. Thus, in a case such as this, in which the merits have been effectively disposed of by the district court, and error in doing so is claimed, plenary review is proper.

CONCLUSION

Probable jurisdiction should be
noted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Harold H. Fuhrman", written over a horizontal line.

Harold H. Fuhrman

George A. Schmus
Attorneys for the Appellants

APPENDIX A

Judgment Order
United States Court of Appeals
For The Seventh Circuit
April 30, 1987

No. 85-2950)
)
SANDRA C. SCHULTZ AND) Appeal from the
ROBERT C. BRAUN,) United States
Plaintiffs-Appellees,) District Court
) for the Eastern
v.) District of
) Wisconsin
RUSSELL FRISBY, et al.,) No. 85 C 1018
Defendants-Appellants.) JOHN W. REYNOLDS,
) Judge

This cause was reheard en banc on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court granting the plaintiffs' request for a temporary injunction is AFFIRMED, with costs, in accordance with the order of this Court entered this date. The case is returned to the District Court for any further proceedings deemed necessary.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

UNPUBLISHED ORDER

NOT TO BE CITED

PER CIRCUIT RULE 53

April 30, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge.

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

HON, JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

*Hon. LUTHER M. SWYGERT, Senior Circuit Judge

SANDRA C. SCHULTZ and
ROBERT C. BRAUN

Plaintiffs-Appellees,

Appeal from the
United States District
Court for the Eastern
District of Wisconsin.

No. 85-2950 v.

John W. Reynolds, Judge
No. 85 C 1018

RUSSELL FRISBY, GEORGE R. HUNT,
ROBERT WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and the
TOWN OF BROOKFIELD
Defendants-Appellants.

ORDER

On April 6, 1978, this Court ordered that the panel opinion reported at 807 F. 2d 1339 (1986) be vacated and that the case be reheard en banc. After rehearing this Court, by an equally divided vote, affirms the judgment of the district court granting the plaintiffs' request for a temporary injunction. The case is returned to the district court for any further proceedings deemed necessary.

* The Honorable Luther M. Swygert, Senior Circuit Judge, heard the arguments as a member of the original panel. He listened to the tapes of the en banc argument and voted afterward.

**The Honorable Kenneth F. Ripple, Circuit Judge, did not participate at all in this appeal.

APPENDIX B

Order of the United State Court
of Appeals for the Seventh Circuit
April 6, 1987

No. 85-2950)
)
SANRA C. SCHULTZ AND) Appeal from the
ROBERT C. BRAUN,) United States
Plaintiffs-Appellees,) District Court
) for the Eastern
v.) District of
) Wisconsin
RUSSELL FRISBY, et al.,) No. 85 C 1018
Defendants-Appellants.) JOHN W. REYNOLDS,
) Judge

Before BAUER, Chief Judge.

Prior report: 7th Cir., 807 F.2d 1339.

A majority of the circuit judges in regular active service have voted to grant the suggestion for rehearing en banc in the above cause.

The panel decision of December 8, 1986 is VACATED pursuant to Internal Operating Procedure 5(f).

APPENDIX C

Opinion of the United States
District Court For The
Eastern District of
Wisconsin

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

v.

Civil Action
No. 85-C-1018

RUSSELL FRISBY,
GEORGE E. HUNT,
ROBERT WARGOWSKI,
HARLAN ROSS,
CLAYTON A. CRAMER, and the
TOWN OF BROOKFIELD,

Defendants.

DECISION AND ORDER

This is an action to enjoin the
enforcement of an anti-picketing ordi-
nance.

Plaintiffs Sandra C. Schultz and
Robert C. Braun filed a complaint on
July 2, 1985, under § 1983 of Title 42
U.S.C., seeking declaratory, preliminary,
and permanent injunctive relief from an

alleged deprivation of their rights under the First and Fourteenth Amendments of the United States Constitution. Defendants in the action are Russell Frisby and George Hunt, Supervisors of the Town Board of Brookfield, Wisconsin; Robert Wargowski, Chairman of the Town Board; Harlan Ross, Chief of the Brookfield Police; Clayton Cramer, attorney for the Town of Brookfield; and the Town of Brookfield itself.

The plaintiffs wish to picket on streets in a residential neighborhood in Brookfield. They challenge the enforcement of a town ordinance which bans such picketing. This court has jurisdiction under 28 U.S.C. § 1343.

At the hearing for a preliminary injunction held on August 13, 1985, the Court considered the facts contained in the following submissions:

(1) plaintiffs' proposed statement of facts; (2) defendants' proposed statement of facts; (3) §§ 9.05, 9.06, 9.08, 9.09,

9.10, 9.17, 9.943.13, 9.943.14, and 9.947.01 of the General Code, Town of Brookfield; (4) a plat map of the Summit Lawn Estates and Black Forest Knoll, Town of Brookfield; (5) a photocopy of a story and accompanying photograph in the May 21, 1985, edition of the Milwaukee Sentinel; and (6) affidavits of Mary T. Baxa, Robert C. Braun, Mary E. Bruders, Reid Brueser, Scott M. Heitman, William B. Peterman, Sandra C. Schultz, Daniel J. Schwantz, Charles Setzke, Mary Setzke, David Setzke, Paula W. Smith, Arlene Victoria, Todd A. Victoria, and Aundrey Wright.

Based on the above-cited materials and on the oral arguments, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiffs Sandra Schultz and Robert Braun believe that abortion is immoral and unjust. Between April 20 and May 20, 1985, Schultz, Braun, and groups of

prolife demonstrators, ranging in size from 11 to more than 40 persons, have on at least six occasions picketed in front of the home of Dr. Benjamin M. Victoria who performs abortions at facilities in Appleton and Milwaukee.

The Town of Brookfield is a residential suburb of the City of Milwaukee and has a population of approximately 4,300 persons. The Town's police force consists of a chief and eight officers. The street on which the Victoria family lives is within a subdivision of the Town zoned exclusively for single-family residences. The road surfaces in the subdivision are approximately 30 feet wide and blacktopped. During the winter the roads are narrowed further by snow piles which accumulate due to plowing. There are no sidewalks, curbs, gutters, or street lights.

On May 7, 1985, the Town of Brookfield enacted an ordinance which provided as follows:

9.17 RESIDENTIAL PICKETING . . .

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (a) picketing in any lawful manner during a labor dispute of the place of the place [sic] of employment involved in such labor dispute, or (b) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

On the following day, defendant Town Attorney Cramer informed plaintiff Schultz that he had instructed defendant Chief of Police Ross not to enforce the new ordinance pending Cramer's research into its constitutionality. The results of this research apparently led to the repeal of the above ordinance and the passage on May 15, 1985, of a substitute ordinance as § 9.17, General Code, Town of Brookfield, which provides as follows:

9.17 RESIDENTIAL PICKETING. (1) DECLARATION. It is declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this chapter will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth. . . .

(2) PICKETING RESIDENCE OF DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

(3) PENALTY FOR VIOLATIONS. Any person violating the provisions of this section of the Town Code of the Town of Brookfield shall upon conviction for a first offense forfeit not

less than \$5 nor more than \$300.00, together with the costs of prosecution, and in default of payment of such forfeiture and costs of prosecution, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not to exceed 30 days.

Any person who shall be guilty of violating this section of the Town Code of the Town of Brookfield who has previously been convicted of a violation thereof within one year, shall upon conviction thereof forfeit not less than \$100.00 nor [sic] more than \$500.00 for each such offense, together with the costs of prosecution and in default of payment of such forfeiture and costs, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not exceeding 90 days.

The General Code of the Town of Brookfield includes a number of ordinances designed to preserve peace and order in the community. These include §§ 9.05 Obstructing Streets and Sidewalks, 9.06 Loud and Unnecessary Noise Prohibited, 9.08 Loitering Prohibited, 9.09 Destruction of Property Prohibited, 9.10 Littering Prohibited, 9.943.13 Criminal Trespass to Land, 9.943.14 Criminal Trespass to Dwelling, and 9.947.01 Disorderly Conduct.

On May 18, 1985, defendant Cramer informed plaintiffs that he had instructed the Brookfield Chief of Police to enforce the new ordinance beginning on its effective date, May 21, 1985. Plaintiffs continued picketing the Victoria residence through May 20 but have refrained from picketing since that time for fear of arrest and prosecution under the new ordinance.

The picketing seems to have been conducted for the most part in a peaceable and orderly fashion. The Town police never had occasion to make an arrest, though this may be a function of the limited surveillance they were able to conduct. On at least one occasion picketers entered onto the Victoria property to tie red ribbons to shrubbery growing there, place a protect sign at the front door of the Victoria house, and tie

another red ribbon to the front door knob.* Mrs. Victoria and one of the Victoria children claim that on one occasion the picketers temporarily prevented them from leaving their residence. The Victorias also believe that picketers photographed their children and residence.

The picketers carried signs with a variety of inscriptions including "Stop Abortion Now," "Aborted Babies Sold for 'Cosmetics,'" "Abortion is Legal Murder," "God Bless America," and "Forgiveness Is Yours for the Asking." Picketers on occasion sang and cheered or shouted other slogans that witnesses say include references to Victoria as a "baby killer." Picketers conversed with passers-by, including at least one neighbor who was told that Victoria was a baby killer. The

* At the oral argument, plaintiffs' counsel explained that the red ribbons were symbols used by the anti-abortionists from Appleton, Wis.

parent and grandparent of a five-year-old child claim that a woman carrying a cross, who was marching with other picketers to the Victoria home, told the child that a baby killer lived nearby and that the child should not go to the Victoria house. The child apparently became frightened following this encounter and would not leave his grandparent's home for the remainder of the day.

Some of the picketers belong to an anti-abortion group in the Milwaukee area where many of them live. Others come from the area of Appleton, a city about 100 miles north of Milwaukee where one of Dr. Victoria's clinics is located. The picketers chose the Victoria residence as a target for picketing because, in the words of plaintiff Schultz:

[]picketing at locations at which Victoria performs abortions would not accomplish what picketing on the public street by his house can accomplish. Moreover, the greater media coverage of residential picketing allows us to reach audiences who might not otherwise

receive our messages. As an additional concern, we do not wish to interfere with efforts of sidewalk counselors to contact prospective abortion clients; picketing near the Victorias' residence (away from the site of the abortions) removes the possibility of such problems, while more effectively conveying our messages to the abortionist and those in his community.

Affidavit of Sandra Schultz (filed July 17, 1985) at 4. Both print and electronic news media in the Milwaukee metropolitan area have covered the picketing which took place at the Victoria residence.

CONCLUSIONS OF LAW

A district court may issue a preliminary injunction only after the moving party demonstrates that--

(1) it has at least a reasonable likelihood of success on the merits, (2) it has no adequate remedy at law and will otherwise be irreparably harmed, (3) the threatened injury to it outweighs the threatened harm the preliminary injunction may cause the defendants, and (4) the granting of the preliminary injunction will not disserve the public interest.

Syntex Ophthalmics, Inc. v. Tsuetaki, 701 F.2d 677, 681 (7th Cir. 1983) (quoting Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795, 796-97 (7th Cir. 1981)).

I find on the facts above that plaintiffs are entitled to a preliminary injunction against the enforcement of the Town of Brookfield's residential picketing ordinance. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Libertarian Party of Indiana v. Packard, 742 F.2d 981, 985 (7th Cir. 1984) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)), for which a legal remedy is inadequate. The injury defendants would sustain by virtue of a preliminary injunction seems relatively small. Granting the injunction would not disserve the public interest. The only real issue here is whether plaintiffs are reasonably likely to

succeed on the merits. I conclude that they are.

I. Protected Activity

Picketing, as a means of expressing one's opinion on a public issue, "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980). No less than the door-to-door distribution of handbills, picketing is "essential to the poorly financed causes of little people." See Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

II. Public Forum

It is settled law that public places associated historically with the exercise of free speech, such as streets, parks, and sidewalks, are to be regarded as public forums. United States v. Grace, 461 U.S. 171, 177 (1983). Residential streets in neighborhoods where there are neither sidewalks nor street lights are

just as much associated with free expression as are the central squares of our cities and towns. See Carey v. Brown, 447 U.S. at 460.

III. Standard

The test for permissible time, place, and manner regulation of speech in a public forum has been restated recently by the United States Supreme Court:

In . . . quintessential public forums, the government may not prohibit all communicative activity. . . . The State may . . . enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The defendants have presented no authority suggesting that single family, residential surroundings make a public street anything less than a quintessential public forum. Therefore, this ordinance must pass the Perry four-pronged test.

A. Content Neutral

The ordinance here in question is content neutral. All residential picketing, regardless of the cause on behalf of which it is conducted, is unlawful in the Town of Brookfield. I see little merit in plaintiffs' argument that an implied exception for labor picketing must be read into an ordinance, the legislative history of which shows a precisely contrary intent.

B. Significant Interest

No doubt the interests which the Town of Brookfield seek to advance by this ordinance are significant. The safety of picketers and passers-by is a serious concern where streets are narrow, there are no sidewalks, and traffic may be heavy. The Town also has an interest in preserving domestic privacy.

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the

tribulations of their daily pursuits, is surely an important value. . . [and] . . . [t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

Carey v. Brown, 447 U.S. at 471. Speech may be regulated to protect privacy. See Martin v. City of Struthers, 319 U.S. at 148. Such interests are significant enough to justify narrowly tailored time, place, and manner regulations of communicative conduct.

C. Not Narrowly Tailored

The Town of Brookfield's ordinance is not, however, narrowly tailored to advance these interests. It completely bans all picketing in residential neighborhoods. One can imagine neutral time, place, and manner regulations, short of a ban on residential picketing, which would go a long way toward the Town's safety and domestic privacy goals. It might be possible to meet safety concerns, for

example, by limiting the time of picketing and the number of persons who may picket at one time. In Wisconsin at least, winter road conditions may make it appropriate to impose some form of seasonal restriction as well. The privacy and tranquility of domestic life can be secured without totally banning picketers from the streets of residential neighborhoods, because some types of peaceful picketing have a negligible impact on privacy interests. Carey v. Brown, 447 U.S. at 469. Picketing can be limited to certain hours. A limit on the number of picketers who may assemble at a residence at a given time would further reduce the intrusiveness of picketing. An absolute ban, however, against a form of protected speech cannot be permitted to stand.

Much communicative activity in an open, and largely urban, society intrudes upon personal life and disturbs its

tranquility. This is at once an unavoidable weakness and a great strength of free speech as it is practiced in this country.

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Martin v. City of Struthers, 319 U.S. at 143.

D. Alternatives

Because defendants' ordinance fails the "narrowly tailored means" prong of the test, it is unnecessary to determine whether plaintiffs have open to them ample alternative channels of communication. I remark only that the crucial word here seems to be "ample." If "ample" means that alternative channels for plaintiffs' speech must be equally effective to allow plaintiffs to stir up the Victoria family, the family's neighbors, the Town of Brookfield, and the City of Milwaukee and allow plaintiffs to garner as much

publicity, then this prong of the test cannot be satisfied here and will hardly ever be satisfied. Picketing subject to legal challenge will almost always attract more media attention than picketing that is not. Thus, if an alternative channel must be "ample" in the sense that it affords the same publicity to speech as does the challenged channel, then speech which more intrudes on people's privacy and is more outrageous (and therefore, unfortunately, more newsworthy) will be for these reasons more likely to receive the protection of the First Amendment. This would be a regrettable development in our First Amendment jurisprudence.

If, on the other hand, "ample" means only that alternative channels must allow plaintiffs to communicate the whole substance of their ideas and emotions to all who are willing to listen, then it seems to me that plaintiffs have such alternative channels in this case. They may distribute leaflets in the Victorias'

neighborhood, Martin v. City of Struthers, 319 U.S. at 146-49; they may march past the Victoria home, see Gregory v. Chicago, 394 U.S. 111 (1969); and, of course, they may picket other more public sites.

I conclude, nevertheless, that the Town of Brookfield's residential picketing ordinance is likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum, and that plaintiffs, therefore, are reasonably likely to succeed on the merits and are thus entitled to a preliminary injunction.

Accordingly, for all the reasons stated,

IT IS THEREFORE ORDERED that the plaintiffs' motion for a preliminary injunction be and hereby is granted, and the defendants are enjoined from enforcing § 9.17(2) of the ordinances of the Town of Brookfield.

IT IS FURTHER ORDERED that if the defendants do not appeal and the court does not receive within sixty days from the filing date of this order a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction, the preliminary injunction issued today will become permanent, and judgment will be entered in favor of the plaintiffs and against the defendants without further notice from the court.

Dated at Milwaukee, Wisconsin, this 7th day of October, 1985.

BY THE COURT:

John W. Reynolds
Chief Judge

APPENDIX D

IN THE UNITED STATES
COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Filed July 16, 1987

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Appellees,

vs.

RUSSELL FRISBY, GEORGE R. HUNT,
ROBERT WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and the
TOWN OF BROOKFIELD,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that
Russell Frisby, George R. Hunt,
Robert Wargowski, Harlan Ross,
Clayton A. Cramer, and the Town of
Brookfield, appellants in this case,
hereby appeal to the Supreme Court of
the United States from the judgment
of the United States Court of Appeals
for the Seventh Circuit dated
April 30, 1987, affirming the
judgment of the United States
District Court for the Eastern
District of Wisconsin dated
October 7, 1985.

This appeal is taken pursuant to 28
U.S.C. § 1254(2).

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Attorneys for Appellants

APPENDIX E

Section 9.17, General Code,
Ordinances of Town of Brookfield,
Wisconsin:

9.17 RESIDENTIAL PICKETING.

(1) DECLARATION. It is declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of wellbeing, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and

interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this chapter will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are enacted by the Town Board of the Town of Brookfield pursuant to the provisions of Section 61.34(1) Wisconsin Statutes, which statute gives powers to the Village Board to enact these regulations, which powers are available to the Town Board pursuant to the Village Board powers assumed by the Town Board pursuant to the

provisions of Section 60.10(2)(c) Wisconsin Statutes.

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

(3) PENALTY FOR VIOLATIONS. Any person violating the provisions of this section of the Town Code of the Town of Brookfield shall upon conviction for a first offense forfeit not less than \$5.00 nor more than \$300.00, together with the costs of prosecution, and in default of payment of such forfeiture and costs of prosecution, shall be imprisoned in the County Jail until such forfeiture and and costs are paid, but not to exceed 30 days.

Any person who shall be guilty of violating this section of the Town Code of the Town of Brookfield who

has previously been convicted of a violation thereof within one year, shall upon conviction thereof forfeit not less than \$100.00 nore [sic] more than \$500.00 for each offense, together with the costs of prosecution and in default of payment of such forfeiture and costs, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not exceeding 90 days.

No. 87-168

Supreme Court, U.S.

FILED

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the trial court exercised permissible discretion by preliminarily enjoining an ordinance banning any and all picketing before or about any residence or dwelling.
2. Whether an ordinance banning any and all picketing before or about any residence or dwelling, including peaceful public issue picketing on public streets, violates the right to freedom of expression under the first amendment.
3. Whether an ordinance banning any and all picketing before or about any residence or dwelling violates the equal protection clause of the fourteenth amendment, when under state law the ordinance does not apply to certain labor picketing.

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No. 87-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

Appellees Sandra C. Schultz and Robert C. Braun hereby move this Court, pursuant to Rule 16, to affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit. That court affirmed the judgment of the U.S. District Court for the Eastern District of Wisconsin, which granted plaintiffs-appellees' motion for a preliminary injunction against enforcement of a ban on residential picketing.

SUMMARY OF FACTS

Appellees Schultz and Braun are advocates of the right to life of all human beings, including children conceived but

not yet born. Benjamin M. Victoria, a resident of the Town of Brookfield, Wisconsin, destroys such children at abortion businesses in Milwaukee and Appleton, Wisconsin.

Schultz, Braun, and other individuals picketed on several occasions on the public street outside Victoria's Brookfield residence. The town board of the Town of Brookfield responded by enacting a ban on all residential picketing except for certain labor picketing. Subsequently the town repealed that ordinance and replaced it with a flat ban on all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

When the picketing ban became effective, Schultz and Braun ceased picketing for fear of arrest and prosecution under the anti-picketing ordinance.

SUMMARY OF PROCEEDINGS

Schultz and Braun, appellees before this Court, brought suit seeking injunctive and declaratory relief. They named as defendants the three members of the town board, the chief of police, the town attorney, and the Town of Brookfield itself, all appellants before this Court.

The U.S. District Court for the Eastern District of Wisconsin granted the motion of appellees Schultz and Braun (hereinafter, "the picketers") for a preliminary injunction, ordering appellants (hereinafter collectively referred to as "the town") not to enforce the Brookfield picketing ban. *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985).

The town appealed, and a panel of the U.S. Court of Appeals for the Seventh Circuit, by a 2-1 vote, affirmed. *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986). At the request of the town, the Seventh Circuit subsequently agreed to rehear the case en banc, and vacated the panel decision for this purpose. 818 F.2d 1284 (7th Cir. 1987). Finally, the en banc court affirmed, by an equally divided court and without a published decision, the judgment of the district court. 818 F.2d 33 (7th Cir. 1987).

The town then appealed to this Court.

JURISDICTION

It is not wholly clear that the Court has appellate jurisdiction in the present case. "There is authority, questioned but never put to rest, that [28 U.S.C.] § 1254(2)" — the purported basis for the town's appeal — "is available only when review is sought of a final judgment The present appeal, however, seeks review of the affirmance of a preliminary injunction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975) (citations omitted). In the recent case of *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169 (1986), also involving review of a preliminary injunction, the Court directly held that jurisdiction is indeed lacking "where the judgment is not final," at least in a situation "where the case is remanded for further development of the facts," *id.* at 2175-76.

The town does not address the finality question in its jurisdictional statement. The town does assert, however, that the decision of the district court effectively disposed of all relevant issues, Jurisdictional Statement at 35-37, and that "[n]o purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction," *id.* at 36. Hence this case, while not legally final, nonetheless may fit into the category of "practically final" cases for which this Court has found appellate jurisdiction to exist. *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 302-03 (1976) (per curiam); *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 83 (1958).

A finding of "practical" finality in the present case, however, is also fraught with difficulty. The town has already requested a trial on the question of a permanent injunction, and although it may have done so solely to preserve its rights, the potential remains that either the town or the picketers will use the trial option to develop additional facts or legal arguments. Furthermore, the Seventh Circuit's affirmance in the present case by an equally divided court, without opinion, gives little guidance concerning the finality of the case. In *Doran*, it was "less than completely certain that the Court

of Appeals did in fact hold [the ordinance] to be unconstitutional, since it considered the merits only for the purpose of ruling on the propriety of preliminary injunctive relief." 422 U.S. at 927. The present case presents an even less certain case of practical finality than *Doran* because the Seventh Circuit's ruling, while binding upon the parties, did not explicitly address the merits at all.

The Court in the past "has avoided the [jurisdictional] issue by utilizing 28 U.S.C. § 2103 and granting certiorari," *Thornburgh*, 106 S. Ct. at 2175 (and cases cited), and thus resolution of the jurisdictional question is not strictly necessary to the disposition of the present case.

The picketers therefore turn to a consideration of the merits of the case.

STANDARD OF REVIEW

This case involves review of a preliminary injunction. Hence "the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard [for preliminary injunctive relief], constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (citation omitted) (affirming appeal from affirmance of preliminary injunction).

The "applicable standard" for preliminary injunctions in the Seventh Circuit requires a court to review four factors:

To obtain a preliminary injunction, a plaintiff must show: (1) that he has no adequate remedy at law or will suffer irreparable harm if the injunction is denied; (2) that the harm he will suffer is greater than the harm the defendant will suffer if the injunction is granted; (3) that the plaintiff has a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest.

ON/TV of Chicago v. Julien, 763 F.2d 839, 842 (7th Cir. 1985) (citation omitted). Cf. *Doran*, 422 U.S. at 931 (noting traditional requirements of irreparable injury and likelihood of

prevailing on the merits).

In the case at bar, the town only contests the factor addressing the merits of the case. Hence, the question for this Court is whether the district court abused its discretion in holding that the picketers were likely to prevail in their challenge to the Brookfield picketing ban.

Resolution of this question depends primarily upon legal issues. Therefore this court may — though it need not — engage in a plenary review of the relevant law, see *Thornburgh*, 106 S. Ct. at 2176-77, instead of the cursory review exemplified in *Doran*, 422 U.S. at 932-34.

In the instant case, however, the difference between the deferential *Doran* standard and a more plenary review is of little significance. The question for review is almost purely legal, and hence the same course of analysis applies under either standard. Moreover, the established precedents of this Court clearly support the ruling of the district court; therefore, an affirmance is proper under either standard.

SUMMARY OF ARGUMENT

The Court should summarily affirm the judgment of the court of appeals for the reason that the questions on which the decision of the cause depends are so plainly settled by the prior decisions of this Court as not to need further argument.

The legal focus of this case is the constitutionality of an anti-picketing ordinance in the Town of Brookfield, Wisconsin. The ordinance forbids "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

As a flat ban on expressive activity in a public forum, the ordinance unconstitutionally deprives the picketers — who wish to picket peacefully on a public street — of their rights under the first amendment. The town rests its defense of the ordinance upon two propositions strikingly at odds with settled constitutional law, and hence plenary consideration of the first amendment question is unwarranted.

The town claims, first of all, that public streets in residen-

tial neighborhoods are not public forum property. Jurisdictional Statement at 11-19. This argument, however, flies in the face of a long and undisturbed line of cases declaring that public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public fora. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (and cases cited); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (public streets and sidewalks in residential neighborhoods are public fora).

The town additionally claims that, even if the streets at issue are public fora, picketing is so inherently disruptive of legitimate state interests as to justify a ban on any and all picketing, even the peaceful protest of a solitary picketer. Jurisdictional Statement at 23-29. This argument, however, also contradicts a long line of precedents. This Court has long held that picketing is not intrinsically unlawful; while a state may regulate picketing, it may not totally ban such expressive activity in a public forum. See *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (overturning picketing ban); *Carey v. Brown*, 447 U.S. at 469 (peaceful residential picketing could have "but a negligible impact on privacy interests").

Even if this Court were willing to give plenary consideration to the town's jurisprudentially revolutionary first amendment arguments, this case would not be the proper vehicle for doing so. The first amendment question is not properly presented: this case is controlled, on equal protection grounds, by *Carey v. Brown*, 447 U.S. 455 (1980).

In *Carey*, this Court held unconstitutional a ban on residential picketing which allowed for certain residential labor picketing. In Wisconsin, state law sanctions the same kind of residential labor picketing. See Wis. Stat. § 103.53(1)(e), (g), (l) (1985-86); *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936) (state law protects labor picketing, during labor dispute, at residence used as place of employment), *aff'd*, 301 U.S. 468 (1937). Consequently, while the Brookfield picketing ban is facially neutral, it must yield to superior state law. Hence the effective reach of the Brookfield ban is indistinguishable, for constitutional purposes, from the statute this Court struck down in *Carey*.

Carey v. Brown obviates the need to address the town's first amendment arguments, arguments which in any case are meritless. This Court should therefore affirm the judgment of the court of appeals without further consideration of this case.

ARGUMENT

The district court in the case at bar correctly determined that the picketers (appellees in this Court) were likely to prevail on the merits of their constitutional challenge to the appellant town's ordinance banning all residential picketing. The court of appeals, in turn, properly affirmed this judgment.

The legal questions the town raises in the present appeal have long been settled by decisions of this Court. The Court should therefore summarily affirm the judgment of the court of appeals, without further briefing or argument.

I. THE BROOKFIELD BAN ON ALL RESIDENTIAL PICKETING, INCLUDING PEACEFUL PUBLIC ISSUE PICKETING ON PUBLIC STREETS, VIOLATES CONSTITUTIONAL FREE SPEECH RIGHTS.

The picketers wish to be free to engage in peaceful, orderly, public issue picketing on a public street in the Town of Brookfield, Wisconsin. Their intended activity receives constitutional protection under the first amendment to the United States Constitution (as incorporated through the fourteenth amendment), and the town has not offered sufficient justification for wholly banning this expressive activity.

Analysis of the picketers' free speech claim proceeds in three steps. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). First, the Court must determine whether the picketers' intended activity represents speech protected under the first amendment. *Id.* Next, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."

Id. Finally, the Court must ascertain whether the asserted justifications for the exclusion of expressive activity satisfy the relevant standard. *Id.*

Application of this analysis to the present case illustrates the permissibility as well as the necessity of a preliminary injunction upholding the picketers' rights.

A. *Peaceful Picketing Constitutes Expressive Activity Under the First Amendment.*

First, the picketers' intended activity plainly constitutes protected expression. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited).

In particular, "[t]here can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods . . . [constitutes] expressive conduct that fails within the First Amendment's preserve." *Carey v. Brown*, 447 U.S. 455, 460 (1980) (citations omitted). Moreover, "[p]ublic issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' . . . has always rested on the highest rung of the hierarchy of First Amendment values . . ." *Id.* at 466-67 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (additional citations omitted).

B. *Public Streets, Including Public Streets in Residential Neighborhoods, are Quintessential Public Fora.*

Second, the public street on which the picketers wish to picket plainly constitutes a public forum. *Carey*, 447 U.S. at 460-61; *United States v. Grace*, 461 U.S. 171, 177 (1983) (" 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums' ") (and cases cited); *Perry Educational Association v. Perry Lo-*

cal Educators' Association, 460 U.S. 37, 45 (1983) ("At one end of the spectrum [of government properties] are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions[;]' such properties are 'quintessential public forums'" (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)); *Cornelius*, 473 U.S. at 802 (traditional public fora include public streets and parks).

The public forum status of residential streets and sidewalks was a central premise underlying the *Carey* decision. *Perry*, 460 U.S. at 55 (discussing *Carey* and another case) ("the key to those decisions . . . was the presence of a public forum"). In *Carey*, this Court struck down an anti-residential picketing statute under the equal protection clause of the fourteenth amendment because it "discriminate[d] among speech-related activities in a public forum," 447 U.S. at 461 (emphasis added). Had the residential streets and sidewalks in question not been public fora, a very different — and less demanding — standard of scrutiny would have applied. See, e.g., *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

The town attempts to challenge the public forum status of its residential streets. See Jurisdictional Statement at 11-19. In light of the overwhelming Supreme Court precedent to the contrary (which the town acknowledges, *id.* at 18), however, it is unclear from what source the town anticipates conjuring up this major change in established constitutional doctrine. See *Grace*, 461 U.S. at 180:

the destruction of public forum status . . . is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expres-

sion. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.

Absent a revolution in constitutional jurisprudence, then, the picketers' intended activity represents constitutionally protected expressive activity in a public forum. The only remaining question is the sufficiency of the town's asserted justifications for banning the picketers.

C. *The Brookfield Ban on Expressive Activity in a Public Forum is Not Narrowly Tailored to Further a Significant Government Interest.*

The governing standard is well-established. In public fora,

the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass[ociation]*, 460 U.S.] at 45. . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177.

The Brookfield ban absolutely prohibits all picketing in a public forum, and thus cannot constitute a reasonable time, place, and manner regulation.

The town offers as its motivation and justification its interest in preserving residential privacy and tranquility. Juris-

dictional Statement at 21-23.¹ This Court has indicated, without so holding, that these interests might well be considered compelling. *Carey*, 447 U.S. at 464-65, 471. As in *Carey*, however, resolution of this question is unnecessary and irrelevant. These interests are neither appropriate nor adequate bases for prohibiting expression in public fora. Furthermore, the anti-picketing law in question is not narrowly tailored to further the asserted residential interests.

1. Residential peace and privacy interests do not justify bans on expressive activity in public fora outside the private domain.

In the first place, the governmental interests in protecting residential peace and privacy do not extend outward from a given dwelling so as to swallow up all expressive rights in the vicinity. Rather, these interests are focused upon — and limited to — the dwelling itself and, to a lesser extent, the accompanying private grounds. Activity outside this residential locus is subject to government control only to the extent that it invades that locus.

Thus a municipality might prohibit "loud and raucous noises," see *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks), because the sounds actually invade and disrupt the peace of a dwelling. Similarly, government may restrict ra-

¹ The town also asserts an interest in public safety. Jurisdictional Statement at 21-22. This interest, however, bears no logical relationship to a ban on all residential picketing. In the first place, there is no evidence to support a conclusion that people who are picketing create any greater hazards than do people who are marching in groups carrying signs — yet the Town concedes the lawfulness of this latter activity, *id.* at 30. Nor is there any evidence to indicate that picketing is any more hazardous than any other pedestrian activities on public streets, such as strolling, jogging, or recreation. Moreover, if picketing actually did increase the risk of car accidents, this risk would be much more serious in the commercial areas of Brookfield, where traffic is both heavier and conducted at higher speeds. Yet the town proposes, and through its ordinance would require, that the picketers take their protest to these more dangerous areas. *Id.* at 31.

dio broadcasts, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent language aired during daytime hours), and delivery of mailed materials, *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (objectionable mailings), insofar as they involve actual intrusions into the home. Government may, in addition, exercise a more limited regulatory power over door-to-door communicative activities, see generally *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (discussing cases).

When the communicative activity takes place on public ways outside the dwelling-place, however, residential peace and privacy concerns simply do not supply an adequate justification for government prohibitions. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (peaceful leafletting in residential neighborhood may not be enjoined); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (peaceful, orderly singing and marching through residential neighborhood and around mayor's residence not constitutionally punishable).

The *Rowan* case is illustrative. The issue there was whether the federal government could "make the householder the exclusive and final judge of what will cross his threshold . . ." 397 U.S. at 736 (emphasis added). The Court unanimously upheld the governmental power to provide this kind of privacy safeguard, holding that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The crucial point of the Court's decision was that unwanted mailings are "a form of trespass," *id.* at 737; thus the resident could bar such communication from "entering his home," *id.* The homeowner may "erect a wall" against this intrusion, *id.* at 738, because the "right of a mailer, we repeat, stops at the outer boundary of every person's domain," *id.* (emphasis added).

In the *Keefe* case, by contrast, an eight-member majority of the Court (seven of whom joined in the *Rowan* decision) summarily rejected residential privacy as a justification for banning peaceful residential leafletting.

Designating the conduct as an invasion of privacy, the

apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan* . . . , relied on by the respondent, is not in point; *the right of privacy involved in that case is not shown here*. Among other important distinctions, respondent is not attempting to stop the flow of information into his household, but to the public.

402 U.S. at 419-20 (emphasis added).

The interest of the Town of Brookfield in protecting peace and privacy in the home, then, is simply inapposite to the present case. The town may, of course, regulate conduct which actually intrudes upon the residential domain. In fact, the town already has ordinances prohibiting: trespass to land and dwellings, making loud and unnecessary noises disruptive of private residences, destroying private property, and littering on private property. Town of Brookfield, Wis., Gen. Code, §§ 9.943.13, 9.943.14, 9.06, 9.09, 9.10. See Addendum.

The town does not, however, have license to ban peaceful, orderly picketing in public areas under the guise of protecting residential peace and privacy. The true goal of the Brookfield ban — to prevent "embarrassment and intimidation" of the picketed resident — simply does not supply a legitimate justification for a ban on speech. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). As the Supreme Court explained in the *Keefe* case,

The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners [the leafletters] plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive

to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

402 U.S. at 419.

2. The Brookfield ban is not narrowly tailored to advance the asserted interests.

Aside from the constitutional impropriety of extending residential peace and privacy concerns beyond their proper domain and into public fora, there is a second fatal deficiency in the proffered justifications of the Brookfield ban: the ordinance is not narrowly tailored to further those interests.

Under the constitutional standards relevant to regulation of expressive conduct in a public forum, reasonable time, place, and manner regulations must be "narrowly tailored" to serve the relevant government interests, and flat bans on a given type of expression must be "narrowly drawn" to further a compelling interest. *United States v. Grace*, 461 U.S. 171, 177 (1983).

These requirements of narrow regulation reflect the principle that in the area of first amendment rights, the state may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (and cases cited). Constitutional rights would be meaningless if the state could sweep them away in the wake of broad laws. The Constitution, therefore, requires government to act with sensitivity to these rights and to allow their full exercise except where their restriction is essential to further an interest of sufficient weight.

- a. The Brookfield ban does not limit itself to regulating abuses, but instead broadly proscribes expressive activity.

The Brookfield ban demonstrates no such sensitivity to

constitutional rights. The anti-picketing ordinance completely bans any and all residential picketing, instead of confining itself to abusive conduct.

The town claims the ban is necessary to protect residential safety and privacy. But the ordinance does not prohibit only violent, unsafe, or disorderly behavior. Instead, the Brookfield ban outlaws all picketing, the peaceful and orderly as well as the disruptive and abusive. This flat ban is a classic example of unconstitutional overbreadth, *see infra* § I(D), and plainly violates the "narrowly tailored" requirement.

The Brookfield ban makes no distinctions and allows for no exceptions in its broad prohibitory application. While content-based exceptions are, of course, inimical to equal protection, *see infra* § II, content-neutral specifications are essential to the narrowing of an otherwise overbroad law. The Brookfield ban, however, makes no effort to distinguish between peaceful picketing and disorderly picketing, between picketing in small numbers or in crowds, between picketing on public streets and sidewalks or on private property, between picketing for a short time or at all hours of the day and night, between picketing on less-traveled roads or on busy thoroughfares. Each of these features bears heavily upon the government interests in safety and privacy. Yet the flat ban the town enacted gives not the slightest heed to any such factors. While laws need not attain microscopic precision, the Brookfield ban presents the opposite extreme of complete insensitivity to the rights and interests at stake.

- b. Picketing is not inherently proscribable.

The town apparently recognizes the radical nature of its ordinance, and thus to defend the ordinance the town takes a radical legal position: *all* picketing is *inherently* so disruptive of residential well-being and privacy that a flat ban is justified. *See Jurisdictional Statement* at 25-29.

The town's position, however, calls for a major departure from established constitutional jurisprudence. As long ago as 1940, this Court refused to consider picketing *per se* to

be a breach of lawfulness sufficient to justify its prohibition.

[N]o clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (overturning picketing ban). Subsequent cases have reaffirmed this principle in such varied setting as outside a home, *Carey v. Brown*, 447 U.S. at 469 ("Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests") (footnote omitted), a school, *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians") (footnote omitted), and a courthouse, *Grace*, 461 U.S. at 182 ("A total ban on [picketing and other communicative activity] is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the [Supreme Court] building than on any other sidewalks in the city").

Since the Brookfield flat ban is not narrowly tailored to further significant government interests, it fails the test for reasonable time, place, and manner regulations of expressive activity. Since the town's defense of its anti-picketing ordinance rests upon a call for major revisions in constitutional law, the trial court properly found the picketers to have a reasonable likelihood of success on the merits of their challenge to the ordinance.

D. *The Brookfield Ban On All Residential Picketing is an Unconstitutionally Overbroad Prohibition of Free Expression.*

The flat ban Brookfield enacted against residential picketing suffers from fatal overbreadth, and thus is unconstitutional on its face.

1. In the context of first amendment rights, litigants may challenge a restriction on grounds of overbreadth.

In the area of first amendment rights, litigants may "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

In the present case, the picketers challenge an ordinance that bans picketing, a classic form of free expression. *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972). The case therefore provides an appropriate vehicle for a facial overbreadth challenge to the ordinance. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) ("[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack").

2. The Brookfield anti-picketing ordinance restricts expressive activity in an unconstitutionally overbroad manner.

The Brookfield ban on all residential picketing is unconstitutionally overbroad because it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The Brookfield ban makes picketing itself the object of its legal animosity, instead of addressing abusive behavior that may or may not be associated with picketing. The proper constitutional principles are clear:

The people through their Legislatures may protect

themselves against th[e] abuse [of rights to free speech and assembly]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

De Jonge v. State of Oregon, 299 U.S. 353, 364 (1931).

As discussed above, the Brookfield ban does not distinguish among the varying situations in which picketing may take place, or limit the ban to picketing of a disruptive or otherwise unlawful nature. The ban sweepingly prohibits all picketing, ignoring the number of picketers, the time and duration of the picket, the orderliness of the picketers, the nature of the vicinity (other than the unspecified proximity of at least one "residence or dwelling"), and the public or non-public character of the specific site used.

Gregory v. City of Chicago, 394 U.S. 111 (1969), illustrates the patent invalidity of the Brookfield ban. In *Gregory*, former Chief Justice Warren proclaimed that the facts presented "a simple case," 394 U.S. at 111, since the protesters' march from city hall to the mayor's residence, where they continued to demonstrate, "falls well within the sphere of conduct protected by the First Amendment," *id.* at 112.²

The *Gregory* case fits into an established first amendment jurisprudence that rejects sweeping and conclusory prohibitions on expressive activity in public fora, and that tolerates only laws which address specific unlawful aspects of the behavior in question. See *Lovell v. Griffin*, 303 U.S. 444 (1938) (overturning blanket, wholly discretionary permit requirement for literature distribution); *Hague v. CIO*, 307 U.S. 496 (1939) (overturning effectively discretionary permit requirement for public assemblies in public streets, parks, and public

² The facts in *Gregory* were as follows: 85 protestors marched to the mayor's home, arriving at about 8 p.m. They chanted and sang while marching around the block, using streets and sidewalks. At 8:30 p.m. the demonstrators stopped singing and chanting, and marched silently until their arrest and dispersion by police at 9:30 p.m. See 394 U.S. at 126-30 (Appendix to opinion of Black, Jr., concurring).

buildings; overturning ban on distribution of handbills and placards); *Schneider v. State*, 308 U.S. 147 (1939) (overturning flat bans on literature distribution on streets and sidewalks; overturning blanket, wholly discretionary licensing requirement for door-to-door canvassing, solicitation, and literature distribution); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning flat ban on loitering or picketing at a place of business); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning breach of peace convictions for peaceful demonstration on statehouse grounds); *Cox v. Louisiana (Cox I)*, 379 U.S. 536 (1965) (overturning breach of peace conviction for peaceful march to and demonstration at courthouse; overturning ban on obstruction of public passages where enforcement left to unbridled discretion of authorities); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (overturning disorderly conduct convictions for peaceful march to and demonstration around residential block); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (overturning blanket, wholly discretionary permit requirement for parades and demonstrations); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (overturning blanket injunction against residential leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (overturning flat ban on charitable solicitation, door-to-door or on public ways, by organizations that do not use at least 75% of receipts for charitable purposes); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (overturning civil liability imposed for non-violent political boycott and associated speeches and non-violent picketing); *United States v. Grace*, 461 U.S. 171 (1983) (overturning flat ban on picketing and leafletting as applied to public sidewalks outside Supreme Court Building).

By sheer force of repetition, this long line of decisions firmly establishes the impropriety of "broad prophylactic rules," and the requirement that regulations address only specific, harmful aspects of expressive behavior.

Thus, as a ban on all residential picketing, including peaceful picketing in a public forum, the Brookfield ordinance is patently unconstitutional. *Accord Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951 (8th Cir. 1987), *reh'g and reh'g*

en banc denied, No. 86-1332 WA (8th Cir. Aug. 28, 1987); *State v. Schuller*, 280 Md. 305, 372 A.2d 1076 (1977); *State v. Anonymus*, 6 Conn. Cir. 372, 274 A.2d 897 (1971); *Flores v. City and County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950) (*en banc*); *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 252 A.2d 622 (1969).

The relevant precedent plainly indicates that the picketers had a reasonable likelihood of succeeding on the merits of their overbreadth challenge to the flat ban at issue here. Issuance of a preliminary injunction against enforcement of this ban was therefore proper.

E. The Decision of the Tenth Circuit in *Garcia v. Gray* Does Not Necessitate Plenary Consideration of the Present Case.

The town cites *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975), as a contrary authority creating a conflict among the federal courts of appeals. *Garcia* sustained against constitutional challenge a flat ban on residential picketing.

Garcia, however, is an isolated and aberrant decision properly limited to its particular facts. The case is highly suspect as a precedent, even in its own federal circuit, and thus by no means requires this Court to engage in full plenary consideration of the case at bar.

1. *Garcia* is properly limited to its own facts.

The *Garcia* case emerged from a fact pattern rather antithetical to the ideal of peaceful picketing. See, e.g. 507 F.2d at 541 ("300 'picketers' . . . on the sidewalk and lawn, . . . a large number of cars . . . racing their motors with sliding wheels, coupled with many honking horns and noisy car occupants"). Hence the case is properly limited to its particular facts. See 507 F.2d at 545 ("ordinance forbidding residential picketing does, from the facts contained in the whole of this record, constitute a valid exercise of governmental power . . .") (emphasis added).

2. *Garcia* employs plainly improper legal analysis.

The *Garcia* court failed to engage in proper first amendment forum analysis, and consequently mistakenly treated public streets and sidewalks as equivalent to private property for free speech purposes. See 507 F.2d at 541, 543. The court considered the forum in question to be "in this case residential structures occupied by the appellees and their families," *id.* at 543. As discussed *supra* § I(C)(1), however, the peace and privacy interests relevant to protection of the home do not necessarily apply outside the home — for example, in a public forum.

The *Garcia* court characterized picketing as a "nuisance" inherently proscribable, 507 F.2d at 544. While this legal conclusion may be a result of the unattractive record in *Garcia*, the conclusion nonetheless runs contrary to established first amendment jurisprudence. See *supra* § I(C)(2)(b).

Perhaps most glaring and indefensible, however, is the *Garcia* court's misuse of citations in supporting its divergence from constitutional jurisprudence. The court states, *id.* at 544-45, that in general the privacy right of the home prevails over the picketer's expressive rights. This statement mischaracterizes the issue, since it blurs the distinction between a public forum and the private domain. This statement also misstates the law, as examination of the supporting string citation reveals.

The *Garcia* court cites the *Gregory* case, in which the protestors' rights prevailed. The court further cites *State v. Anonymous*, 6 Conn. Cir. 372, 274 A.2d 897 (1971), which upheld the right to engage in residential picketing. The court even cites *Keefe v. Organization for a Better Austin*, 115 Ill. App. 2d 236, 253 N.E.2d 76 (1969), listing it as "rev'd on other grounds" in the Supreme Court. In *Keefe*, however, this Court explicitly rejected privacy rights as justifying prohibitions on expressive conduct in public fora. *Keefe*, 402 U.S. 415, 419-20 (1971). Beyond these contrary authorities, the *Gar-*

cia court cites several labor cases,³ an American Law Reports annotation, and a solitary supporting state court decision, *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971).

3. *Garcia* is no longer valid authority in the Tenth Circuit.

There is little reason to believe that the *Garcia* decision remains a valid precedent, even in the Tenth Circuit, where it originated. Appellees' research reveals no subsequent federal decision in the Tenth Circuit that has relied upon or even cited *Garcia* with respect to its first amendment analysis. Moreover, recent decisions of the Tenth Circuit indicate that that court of appeals now recognizes — in implicit repudiation of *Garcia* — both the need to apply proper forum analysis, e.g., *Bell v. Little Axe Independent School District No. 70 of Cleveland County*, 766 F.2d 1391, 1400-02 (10th Cir. 1985) (access to public school facilities), and the need to examine restrictions on first amendment activity for the requisite "narrow specificity," *ACORN v. Municipality of Golden, Colorado*, 744 F.2d 739, 746 (10th Cir. 1984) (door-to-door canvassing). In light of these and other intervening decisions in the Tenth Circuit, as well as a multiplicity of decisions both in other circuits and in this Court, *Garcia* is no longer good law.

Garcia, then, offers scant assistance to the town in the present case. Its unique facts, patently erroneous legal analysis, and suspect precedential status in its own circuit render it a decision without authority. *Garcia* does not create a conflict among the circuits of sufficient substance to justify more than a summary disposition of the present case.

³ Two of these five labor cases predate the 1940 *Thornhill* decision recognizing constitutional protection for picketing, all were decided in or before 1947, and only one was a Supreme Court decision. That case, *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), dealt with unfair labor practices, and explicitly declined to address the constitutional questions at issue here. 315 U.S. at 751.

II. THE BROOKFIELD BAN ON RESIDENTIAL PICKETING VIOLATES EQUAL PROTECTION WHEN, UNDER STATE LAW, THE ORDINANCE DOES NOT APPLY TO CERTAIN LABOR PICKETING.

In addition to its unconstitutionality as a violation of free speech rights, the Brookfield ban denies the picketers equal protection of the laws in contravention of the fourteenth amendment to the United States Constitution. While the district court did not accept this argument (and the court of appeals, issuing no opinion, did not address it), the equal protection rationale provides a straightforward alternative ground for upholding the trial court's ruling that the picketers had a reasonable likelihood of success on the merits of their claim.

A. *Despite Its Absolute Terms, the Brookfield Ban Cannot Apply to Certain Labor Picketing Authorized Under State Law.*

The Brookfield ban appears on its face to be content neutral and completely without exception in its application. As a municipal ordinance, however, the anti-picketing law is subject to higher legal authority, such as state and federal statutory law. In particular, the picketing ban must yield to specific state authorization of certain labor picketing.

Wisconsin statutory law provides as follows:

103.53 Lawful conduct in labor disputes.

(1) The following acts, whether performed singly or in concert, shall be legal:

* * *

(e) Giving publicity to and obtaining or communicating information regarding the exis-

tence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

* * *

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

* * *

(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

Wis. Stat. § 103.53(1)(e), (g), (l) (1985-86). The Supreme Court of Wisconsin has applied this statutory approval of labor picketing in the context of the labor picketing of a residence used as a place of business. See *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936), *aff'd*, 301 U.S. 468 (1937).

Because the flat ban contained in the Brookfield ordinance conflicts with this state statute, the ordinance is invalid to the extent of the conflict.⁴ *Volunteers of America v. Village of Brown Deer*, 97 Wis. 2d 619, 622, 294 N.W.2d 44, 46 (Ct. App. 1980); accord *Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 529, 271 N.W. 2d 69, 74 (1978). In other words, the state-wide

⁴ While the relevant Wisconsin labor statute precludes a ban on protected labor picketing, it would not necessarily conflict with — and hence preempt — reasonable time, place, or manner restrictions. Thus, the equal protection problems resulting from the present conflict between state and local law need not plague all local efforts to regulate picketing.

authorization of labor picketing takes precedence over the prohibitory local ordinance; consequently, the Brookfield ordinance, by operation of law, must exempt at least the peaceful picketing of a place of business involved in a labor dispute.

B. *The Differing Treatment of Labor and Nonlabor Picketing Constitutes Invidious Discrimination Against Protected Expression.*

In *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated a statute which prohibited residential picketing in most instances, but which did not ban the peaceful picketing of a place of employment involved in a labor dispute. See *id.* at 457. The Court noted that “peaceful picketing on the public streets and sidewalks in residential neighborhoods [constitutes] expressive conduct that falls within the First Amendment’s preserve.” *Id.* at 460 (citations omitted). The Illinois regulatory scheme, by “exempting from its general prohibition only the ‘peaceful picketing of a place of employment involved in a labor dispute,’ . . . discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator’s communication.” *Id.* (footnote omitted). Such content-based discrimination violated the Equal Protection Clause, the Court held, since the legislation was not “finely tailored to serve substantial state interests.” *Id.* at 461-62. Neither the interest in residential privacy, *id.* at 464-65, nor the interest in special protection for labor protests, *id.* at 466-67, nor any combination of these, *id.* at 467-69, sufficed to justify such discriminatory regulation of picketing; thus, the Illinois anti-picketing statute was unconstitutional.

That the labor exception to the Brookfield picketing ban arises outside the terms of the ordinance has no constitutional significance. The effective reach of the law is identical, for equal protection purposes, to that of the unconstitutional Il-

linois statute.⁵ Hence *Carey* controls this case, and the Brookfield ban is plainly unconstitutional.

Since the Brookfield ban in its effective operation denies the picketers the equal protection of the law, the picketers are reasonably likely to succeed on the merits or their challenge, and the preliminary injunction was appropriate.

⁵ If Illinois had enacted the labor exception as a separate statute (e.g., "Any provision to the contrary notwithstanding, peaceful picketing during a labor dispute shall be legal"), a facially complete ban on residential picketing would still be unconstitutionally discriminatory under *Carey*. The ban would be unconstitutional, regardless of whether the prohibitory law contained an explicit labor exception, because the independently existing authorization of labor picketing would effectively limit the application of the picketing ban to nonlabor picketing. Otherwise a state could circumvent and frustrate the *Carey* rule by the merely formal device of enacting the unconstitutional law in two distinct pieces.

CONCLUSION

The district court exercised permissible discretion when it issued a preliminary injunction against the Brookfield flat ban on residential picketing. The picketers clearly satisfied the criteria for the issuance of a preliminary injunction, and in particular demonstrated far more than the necessary reasonable likelihood of success on the merits of their claim. The court of appeals therefore properly affirmed the district court. This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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September 16, 1987

ADDENDUM: Selected Ordinances of the Town of Brookfield, Wis.

9.05 OBSTRUCTING STREETS AND SIDEWALKS PROHIBITED. No person shall stand, sit, loaf, loiter or engage in any sport or exercise on any public street, sidewalk, bridge or public ground within the Town in such manner as to prevent or obstruct the free passage of pedestrian or vehicular traffic thereon or to prevent or hinder free ingress or egress to or from any place of business or amusement, church, public hall or meeting place, except with the permission of the Town Board upon written application to the Board.

9.06 LOUD AND UNNECESSARY NOISE PROHIBITED. No person shall make or cause to be made any loud, disturbing or unnecessary sounds or noises such as may tend to annoy or disturb another in or about any public street, alley, park or any private residence.

9.08 LOITERING PROHIBITED. (1) **LOITERING OR PROWLING.** No person shall loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a police or peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances makes it impracticable, a police or peace officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this subsection if the police or peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the police or peace officer at the time, would have dispelled the alarm.

(2) **OBSTRUCTION OF HIGHWAY BY LOITERING.** No person shall obstruct any street, birdge, sidewalk or crossing by lounging or loitering in or upon the same after being requested to move on by any police officer.

(3) **OBSTRUCTION OF TRAFFIC BY LOITERING.** No person shall loaf or loiter in groups or crowds upon the public streets, alleys, sidewalks, street crossing or bridges, or in any other public places within the Town, in such manner as to prevent, interfere with or obstruct the ordinary free use of the public streets, sidewalks, street crossings and bridges or other public places by persons passing along and over the same.

(4) **LOITERING AFTER BEING REQUESTED TO MOVE.** No person shall loaf or loiter in groups or crowds upon the public streets, sidewalks or adjacent doorways or entrances, street crossings or bridges or in any other public place or on any private premises without invitation from the owner or occupant, after being requested to move by any police officer or by any person in authority at such places.

9.09 DESTRUCTION OF PROPERTY PROHIBITED. No person shall willfully injure or intentionally deface, destroy or unlawfully remove, take or meddle with any property of any kind or nature belonging to the Town or its departments, or to any private person without the consent of the owner or proper authority.

9.10 LITTERING PROHIBITED. No person shall throw any glass, garbage, rubbish, waste, slop, dirty water or noxious liquid, or other litter or unwholesome substance upon the streets, alleys, highways, public parks or other property of the Town or upon any private property not owned by him or upon the surface of any body of water within the Town.

9.29.288 to 9.948.16 OFFENSES AGAINST STATE LAW SUBJECT TO FORFEITURE. The following statutes

following the prefix "9" defining offenses against the peace and good order of the State are adopted by reference to define offenses against the peace and good order of the Town, provided the penalty for commission of such offenses hereunder shall be limited to a forfeiture imposed under § 25.04 of this Code.

- 9.943.13 Criminal Trespass to Land
- 9.943.14 Criminal Trespass to Dwelling
- 9.947.01 Disorderly Conduct

No. 87-168

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

Supreme Court, U.S.

FILED

FEB 22 1988

CLERK

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court of
Appeals for the Seventh Circuit

JOINT APPENDIX

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1100 W. Wells St.
Milwaukee, WI 53233
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Attorneys for
Appellees

Appeal Docketed July 28, 1987
Jurisdiction Postponed January 11, 1988

EDITOR'S NOTE

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DECISIONS AND ORDERS OMITTED FROM
JOINT APPENDIX

The following decisions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

Opinion of the United States
District Court for the Eastern
District of Wisconsin A-3

Order of the United States
Court of Appeals for the
Seventh Circuit, April 6,
1987 A-2

Judgment Order of the
United States Court of
Appeals for the Seventh
Circuit, April 30, 1987 A-1

JOINT APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

vs.

CIVIL ACTION NO.
85-C-1018

RUSSELL FRISBY, GEORGE
R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE,
DECLARATORY, AND OTHER RELIEF

PARTIES

I.

Plaintiff, Sandra C. Schultz, is a
citizen of the United States of America and a
resident of the City of Milwaukee, County of
Milwaukee, State of Wisconsin.

Plaintiff, Robert C. Braun, is a citizen
of the United States of America and a resident
of the City of West Allis, County of
Milwaukee, State of Wisconsin.

II.

Defendant, Russell Frisby, is now and at all times material hereto duly elected and acting Supervisor of the Town Board of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin, upon Plaintiffs' information and belief.

Defendant, George R. Hunt, is now and at all times material hereto duly elected and acting Supervisor of the Town Board of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin, upon Plaintiffs' information and belief.

Defendant, Robert Wargowski, is now and at all times material hereto duly elected and acting Chairman of the Town Board of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State

of Wisconsin, upon Plaintiffs' information and belief.

Defendant, Harlan Ross, is now and at all times material hereto duly elected and acting Chief of Police of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin, upon Plaintiffs' information and belief.

Defendant, Clayton A. Cramer, is now and at all times material hereto serving as attorney for the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant is a resident of the City of Waukesha, County of Waukesha, State of Wisconsin, upon Plaintiffs' information and belief.

Defendant, Town of Brookfield, is a municipal corporation and governmental subdivision of the State of Wisconsin.

JURISDICTION

III.

This action arises under the United State Constitution, particularly the First and Fourteenth Amendments, and under federal law, particularly Title 42 of the United States Code, Section 1983. This Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Sections 1331, 1343, 2201, 2202. Venue is proper under 28 U.S.C. § 1391(b). Each and all of the acts of Defendants alleged herein were done by Defendants, and each of them, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the Town of Brookfield and under the authority of their offices as officials for such Town.

COMPLAINT

IV.

Prior to May 21, 1985, Plaintiffs had periodically picketed peacefully on the 700 block of Briar Ridge Drive, a public street in

the Town of Brookfield. Plaintiffs at all times were peaceful and violated no State, County, or Municipal statute, law or ordinance.

On May 15, 1985, Defendant, Town of Brookfield, through its Town Board, enacted and adopted § 9.17, Gen. Code, Town of Brookfield, Wisconsin (hereinafter "picketing ordinance"), which banned all picketing on or about a residence. Said ordinance made no exclusion for picketing which takes place on public streets and sidewalks.

On May 18, 1985, Defendant Cramer informed Plaintiffs, through a letter to Plaintiffs' attorney Weber, that he had instructed the Chief of Police of the Town of Brookfield to enforce the provisions of the picketing ordinance on and after May 21, 1985.

V.

Plaintiffs wish to engage in further peaceful picketing on public streets in the Town of Brookfield, but are inhibited from

doing so because of the threat of arrest and prosecution under the picketing ordinance.

VI.

Plaintiffs, as a result of the threat of future arrest and prosecution, currently suffer the denial of their rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States, through the actions of Defendants under color of law. This violation of Plaintiffs' constitutional rights has caused and will continue to cause Plaintiffs to suffer extreme hardship and actual and impending irreparable injury and damage. Moreover, because of the foregoing, Plaintiffs have no adequate or speedy remedy at law to correct these continuing deprivations of their most cherished constitutional liberties.

Wherefore, Plaintiffs demand judgments:

1. Temporarily restraining Defendants, their agents, employees, and all persons in active concert or participation with them or any of them, from attempting to apply the

aforementioned picketing ordinance against the Plaintiffs;

2. Granting a preliminary and permanent injunction enjoining Defendants, their agents, employees, and all persons in active concert or participation with them or any of them, from attempting to apply the aforementioned picketing ordinance against the Plaintiffs;

3. Granting a preliminary and permanent injunction enjoining Defendants, their agents, employees, and all the persons in active concert or participation with them or any of them, from filing or attempting to file any ordinance violation or criminal or other complaints or charges against Plaintiffs;

4. Declaring the aforementioned picketing ordinance to be unconstitutional on its face and as applied to Plaintiffs;

5. Adjudging, decreeing, and declaring the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations

controversy, in order that such declarations shall have the force and effect of final judgment;

6. Awarding Plaintiffs the reasonable costs and expenses of this action, including attorneys fees in accordance with 42 U.S.C. § 1988;

7. Granting Plaintiffs such other and further relief as may appear to the Court to be equitable and just.

Dated this 2nd day of July, 1985.

PRESENTED BY:

WALTER M. WEBER
Associate General Counsel
Catholic League for
Religious and Civil
Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

STEVEN FREDERICK McDOWELL
General Counsel
Catholic League for
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Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

ATTORNEYS FOR PLAINTIFFS,
SANDRA C. SCHULTZ and
ROBERT C. BRAUN

JOINT APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SANDPA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

vs.

CIVIL ACTION NO.
85-C-1018

RUSSELL FRISBY, GEORGE
R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, Sandra C. Schultz and Robert C. Braun, by their undersigned attorney, pursuant to Federal Rules of Civil Procedure 7(b) and 65(a), hereby move this court to issue forthwith a preliminary injunction, enjoining Defendants, their officers, agents, employees, successors, attorneys and all those in active concert or participation with them, from all actions enforcing § 9.17, Gen. Code, Town of Brookfield, Wisconsin, or any other similar statute or ordinance against Plaintiffs,

including arrests and institution of prosecution, in matters pertaining to peaceful picketing on public streets and sidewalks, pending hearing and determination of Plaintiffs' motion for a permanent injunction.

Unless this motion is granted, Plaintiffs will suffer immediate and irreparable injury, loss, and damage as a result of the actions of Defendants, as more fully appears in the verified complaint and affidavits filed in this action.

Dated July 18, 1985.

PRESENTED BY:

/s/ Walter M. Weber
WALTER M. WEBER
Associate General Counsel
Catholic League for
Religious and Civil
Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

STEVEN FREDERICK McDOWELL
General Counsel
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Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

ATTORNEYS FOR PLAINTIFFS,
SANDRA C. SCHULTZ and
ROBERT C. BRAUN

NOTICE OF MOTION

To: George A. Schmus, Attorney for Defendants

Please take notice that on August 13,
1985 at 9:30 a.m., in Room 425, United States
Court House, 517 E. Wisconsin Avenue,
Milwaukee, Wisconsin 53202, the United States
District Court for the Eastern District of
Wisconsin, John W. Reynolds, Chief Judge, will
hold a hearing on this motion.

/s/ Walter M. Weber
WALTER M. WEBER

JOINT APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

-vs-

DEFENDANTS'
ANSWER

RUSSELL FRISBY, GEORGE
R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Civil Action No.
85-C-1018

Defendants.

The above-named defendants, by their
attorney, George A. Schmus, hereby Answer the
plaintiffs' complaint as follows:

PARTIES

I.

On information and belief, admit the
allegations of paragraph I.

II.

Admit the allegations of paragraph II,
with the qualification that Chief of Police
Harlan Ross is a resident of the City of
Waukesha, Waukesha County, Wisconsin.

JURISDICTION

III.

Admit the jurisdiction of this Court over the subject matter of this action.

Admit that the defendants acted pursuant to applicable statutes, ordinances and regulations; deny that they acted under customs or usages since the subject matter of this action is unique to the defendants.

COMPLAINT

IV.

Admit that prior to May 21, 1985, plaintiffs picketed in the 700 block of Briar Ridge Drive, in the Town of Brookfield; deny that the picketing was peaceful and not in violation of law.

Admit that on May 15, 1985, the Town Board of the Town of Brookfield adopted the ordinance which is part of the subject matter of this action.

Admit that on May 18, 1985, Defendant Cramer advised Plaintiffs' attorney by letter,

that the ordinance would be enforced on and after May 21, 1985.

V.

Answering paragraph V, defendants allege no knowledge of the state of mind of the plaintiffs and put them to their proof thereof.

VI.

Defendants deny plaintiffs are denied any constitutional rights by the said Town ordinance; deny plaintiffs suffer extreme hardship and actual and impending irreparable injury and damage; deny plaintiffs have no adequate remedy at law.

WHEREFORE, defendants pray for judgment dismissing the plaintiffs complaint, and for their reasonable costs and expenses of this action, including attorneys fees.

Dated this 26 day of July, 1985.

10701 W. National
Avenue
West Allis, WI 53227
321-1400

GEORGE A. SCHMUS
Attorney for the
Defendants
/s/ George A. Schmus

JOINT APPENDIX D

CATHOLIC LEAGUE FOR RELIGIOUS & CIVIL RIGHTS
OFFICE OF GENERAL COUNSEL
1100 WEST WELLS STREET
MILWAUKEE, WISCONSIN 53233 (414) 289-9331

August 2, 1985

Hon. John W. Reynolds
Chief U.S. District Judge
United States District Court
517 E. Wisconsin Avenue, Rm. 471
Milwaukee, WI 53202

Re: Schultz v. Frisby, Civil Action No.
85-C-1018: Statement of Uncontested
Facts

Dear Judge Reynolds:

I have discussed the matter of agreed facts with George A. Schmus, Attorney for Defendants, and we feel that the two sets of proposed facts, with supporting affidavits, submitted for each side, present the Court with an adequate factual picture of the controversy, with the following notes:

1. Defendants' proposed statement, at page 6, of the legal issue accurately implies that the issue in this case is picketing, not abortion. The statement should not be construed, of course, to limit the legal arguments Plaintiffs raise against the anti-residential picketing ordinance.
2. Plaintiffs' proposed statement should be modified as follows:
 - a. Paragraph 6 should state that Defendant Harlan Ross is a resident

of the City of Waukesha, County of
Waukesha, State of Wisconsin.

- b. Paragraph 9 should be deleted in
view of Defendants' more elaborate
description of the town, at page 1
of their proposed statement.
- 3. Defendants and Plaintiffs dispute the
details of the picketers' behavior.

In light of the foregoing, counsel for
both Plaintiffs and Defendants believe that no
evidentiary hearing is necessary.

Sincerely,

/s/ Walter M. Weber
Walter M. Weber
Attorney for
Plaintiffs

WMW:ldg

cc: George A. Schmus
Jeanine S. Larson, WCLUF

JOINT APPENDIX E
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

vs.

CIVIL ACTION NO.
85-C-1018

RUSSELL FRISBY, GEORGE
R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Defendants.

PROPOSED STATEMENT OF UNCONTESTED FACTS

Plaintiffs, Sandra C. Schultz and Robert
C. Braun, hereby propose that the following
serve as an agreed statement of facts:

1. Plaintiff, Sandra C. Schultz, is a
citizen of the United States of America and a
resident of the City of Milwaukee, County of
Milwaukee, State of Wisconsin.

2. Plaintiff, Robert C. Braun, is a
citizen of the United States of America and a
resident of the City of West Allis, County of
Milwaukee, State of Wisconsin.

3. Defendant, Russell Frisby, is now and at all times material hereto duly elected and acting Supervisor of the Town Board of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin.

4. Defendant, George R. Hunt, is now and at all times material hereto duly elected and acting Supervisor of the Town Board of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin.

5. Defendant, Robert Wargowski, is now and at all times material hereto duly elected and acting Chairman of the Town Board of Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin.

6. Defendant, Harlan Ross, is now and at all times material hereto duly elected and

acting Chief of Police of the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant also is a resident of the Town of Brookfield, County of Waukesha, State of Wisconsin.

7. Defendant, Clayton A. Cramer, is now and at all times material hereto serving as attorney for the Town of Brookfield, County of Waukesha, State of Wisconsin; Defendant is a resident of the City of Waukesha, County of Waukesha, State of Wisconsin.

8. Defendant, Town of Brookfield, is a municipal corporation and governmental subdivision of the State of Wisconsin.

9. The town of Brookfield is predominantly residential, although it does contain two small commercial areas.

10. Plaintiffs Schultz and Braun believe in the immorality and injustice of abortion.

11. Benjamin M. Victoria, Jr. performs at a facility in Appleton, Wisconsin and at an office in Milwaukee, Wisconsin.

12. Victoria resides at 750 Briar Ridge Drive, in the Town of Brookfield.

13. On April 20, 1985, at about 11:00 a.m., Plaintiff Schultz, along with a group of other prolife demonstrators, picketed on the public street in front of 750 Briar Ridge Drive.

14. On May 7, the Town Board of the Town of Brookfield enacted an ordinance which provided in pertinent part as follows:

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (a) picketing in any lawful manner during a labor dispute of the place of the place [sic] of employment involved in such labor dispute, or (b) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

15. On May 8, Defendant Cramer informed Plaintiff Schultz and other picketers, through a letter to Plaintiffs' attorney Walter M. Weber, that he had instructed the Chief of Police not to enforce the ordinance enacted the previous day until further notice. Cramer

indicated that he wished to research the constitutionality of the ordinance.

16. On May 9, at about 6:30 p.m., Plaintiff Schultz and others picketed on the public street in front of 750 Briar Ridge Drive.

17. On May 15, the Town Board repealed the ordinance passed the previous week, and enacted a new ordinance as § 9.17, Gen. Code, Town of Brookfield, Wisconsin, which provided in pertinent part as follows:

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

18. On May 16, at about 6:30 p.m., Plaintiff Braun and others picketed on the public street in front of 750 Briar Ridge Drive. The new ordinance was not yet effective.

19. On May 18, Defendant Cramer informed Plaintiffs, through a letter to Plaintiffs' attorney Weber, that he had instructed the Chief of Police of the Town of Brookfield to

enforce the provisions of the picketing ordinance on and after May 21, 1985, the date the ordinance was to take effect.

20. On May 20, at about 6:30 p.m., Plaintiffs Braun and Schultz and others picketed on the public street in front of 750 Briar Ridge Drive.

21. On May 21, the new ordinance became effective.

22. The pickets which the Plaintiffs each attended lasted from one to two hours. The picketing was at all times peaceful, orderly, and in conformity with all governing laws. The picketers, and Plaintiffs in particular, did not obstruct traffic, create excessive noise, harass or threaten anyone, or otherwise behave unreasonably.

23. Plaintiffs wish to picket on the public street in front of 750 Briar Ridge Drive in order to:

- a) express their opposition to abortion,
- b) express to Victoria their sincere and profound opposition to his performance of abortions,

- c) inform those living in Victoria's neighborhood of the fact that Victoria performs abortions,
- d) inform those living in the area and all who learn of the picketing that abortion is a matter of concern for local communities and not just an abstract and distant political matter,
- e) communicate their opposition to abortion in a location at which their efforts will least interfere with the efforts of sidewalk counselors to contact prospective abortion clients,
- f) exercise and express their support for their right to freedom of expression on public streets and sidewalks.

24. Plaintiffs wish to engage in peaceful picketing on the public street in front of 750 Briar Ridge Drive.

25. Plaintiffs do not wish to trespass on private property, engage in unruly, violent, or disruptive conduct, interfere with the free passage of pedestrians and vehicles, make excessive noise, harass anyone, or otherwise engage in unreasonable conduct.

26. Plaintiffs do not wish to violate any federal, state, or local statute, law or ordinance.

27. Plaintiffs currently refrain from picketing to avoid the threat of arrest and prosecution under the ordinance now in effect.

Respectfully submitted,

/s/ Walter M. Weber
WALTER M. WEBER
Associate General Counsel
Catholic League for
Religious and Civil
Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

STEVEN F. McDOWELL
General Counsel
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1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

ATTORNEYS FOR PLAINTIFFS,
SANDRA C. SCHULTZ and
ROBERT C. BRAUN

July 18, 1985

JOINT APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF ROBERT C. BRAUN

ROBERT C. BRAUN, being duly sworn on
oath, deposes and says as follows:

1. I am a plaintiff in the above-entitled action.
2. I have personal knowledge of the facts stated herein, and if called as a witness, I could testify competently thereto.
3. I am a citizen of the United States and a resident of the City of West Allis, County of Milwaukee, State of Wisconsin.
4. I am married and have five children.
5. I am a community activist and advocate on behalf of the poor and unemployed and other needy people. Over the past three years I have been involved in organizing and running a variety of projects designed to assist needy people in the Milwaukee area. These projects include

supplying food, clothing, shelter, and other basic items to those who lack these things. At present I am working to set up a worker cooperative in the Milwaukee metropolitan area which will create jobs for poor unemployed people. This project has already received a grant of \$13,000 from Milwaukee County, as well as commitments for matching in-kind contributions from various job-creative organizations.

6. I strongly oppose abortion, and firmly believe in caring and supportive alternatives to such an unjust, immoral, violent "solution" to problems associated with pregnancy.
7. I hold in the highest regard the constitutional rights of free expression afforded to people in this nation.
8. Sometime in May of this year I heard about the picketing in front of an abortionist's residence that was going on in the Town of Brookfield. When I learned that local officials were

considering legal efforts to silence this activity, I became concerned.

9. On Wednesday, May 15, I attended a meeting of the Town Board of the Town of Brookfield. At that meeting the Board was to vote on an ordinance banning all picketing at residences in the Town of Brookfield. I expressed to the Board my dismay at the idea of such a drastic restriction on the rights to free expression. The Board nonetheless adopted the ban.
10. On Thursday, May 16, at about 6:30 p.m., I joined the prolife picketers on the public street in front of the abortionist's house at 750 Briar Ridge Drive in the Town of Brookfield. The picketing ban was not yet in effect.
11. On Monday, May 20, at about 6:30 p.m., I again joined picketers on the same street in Brookfield. The picketing ban was to go into effect the following day.

12. At each of the pickets I attended, all of the demonstrators conducted themselves in a peaceful, orderly manner. I was quite impressed with the good behavior of all who took part in the picket.
13. The pickets I attended lasted about two hours.
14. When I was picketing, I had the opportunity to converse with some neighbors who were passing by. All supported us in our concern over the work of the abortionist. Some suggested that we should picket someplace else because they made a lot of money and paid a lot for their houses. Others had no objection to our activity and said they understood why we were out there.
15. I am concerned about the terrible work of the abortionist, and wish to continue picketing to express that concern and educate the community.
16. I am also greatly concerned that if a local municipal government can so easily

silence the voices of concerned citizens, then our constitutional freedoms are all in grave jeopardy. Who knows what they will do next, if they can ban picketing on public streets? I wish to continue picketing to express my concern over this danger to the freedom to speak out.

17. I find it very distrubing that the Town Board has broadly condemned all picketers. I have picketed before, on other matters, and always conducted myself in a peaceful, orderly mannger. I am offended that the Board treats my and other people's picketing as if it were the same as the abusive and violent practices of some other individuals.

18. I am not now picketing becaues I do not wish to be arrested and prosecuted under the current picketing ban.

19. I earnestly desire a speedy end to the current restriction on our rights, and am distrubed that the municipality has

already shut down the picketing for well
over a month.

/s/ Robert C. Braun
Robert C. Braun

(Jurat Omitted in Printing)

JOINT APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF SANDRA C. SCHULTZ

SANDRA C. SCHULTZ, being duly sworn on
oath, deposes and says as follows:

1. I am a plaintiff in the above-entitled
action.
2. I have personal knowledge of the facts
stated herein, and if called as a wit-
ness, I could testify competently
thereto.
3. I am a citizen of the United States and a
resident of the City of Milwaukee, County
of Milwaukee, State of Wisconsin.
4. I am married and have two children.
5. Before moving to Milwaukee, I was a
teacher of elementary school children
(K-8) at St. John Lutheran School in New
Haven, Michigan. Since arriving in
Milwaukee, in December of 1982, I have
been a full-time housewife and mother.

6. I believe deeply that abortion is a tragic and immoral injustice. I believe in offering a concerned and loving outreach to everyone involved in the promotion and performance of abortion--including abortionists and their clientele.
7. Shortly after arriving in Milwaukee I involved myself in prolife work. In January of 1984 I helped found Milwaukee Coalition for Life (MCFL). MCFL is an interdenominational Christian group dedicated to stopping abortion through peaceful, direct action such as sidewalk counseling, picketing, and leafleting. I am currently president of MCFL.
8. On Saturday, April 20, 1985, MCFL sponsored a picket on the public street in front of the house of abortionist Benjamin M. Victoria, Jr., 750 Briar Ridge Drive, in the Town of Brookfield, at about 11:00 a.m. I attended the

picket, as did a number of other proliferers.

9. On May 7, I received a phone call from a reporter informing me that the Town Board of the Town of Brookfield planned to vote on an anti-picketing law. I attended the meeting. I expressed my opposition to such a restriction on our right to freedom of expression, and explained my belief that the proposed law was unconstitutional. The Board nevertheless passed the ordinance.
10. On May 9, at about 6:30 p.m., I again picketed, along with others, on the public street in front of 750 Briar Ridge Drive. At first we had been fearful of possible arrests, and thus reluctant to picket. Fortunately we learned that the attorney for the Town of Brookfield, Mr. Clayton Cramer, had instructed the Chief of Police, Harlan Ross, not to enforce the picketing ban yet. Mr. Cramer

indicated that he wished to investigate whether the law was unconstitutional.

11. On May 15 the Town Board had another meeting, which I did not attend. The Board, at Mr. Cramer's recommendation, repealed the old ordinance and passed a new law which completely banned picketing in front of residences.
12. On May 20, at about 6:30 p.m., I again picketed along with others on the public street in front of 750 Briar Ridge Drive. The new law did not go into effect until the following day, May 21.
13. At every picket I participated in, the picketers were all peaceful and orderly. The picketers confined themselves to the public street, did not block any passing traffic, and did not create any excessive noise. Furthermore, the picketers did not break any laws. I personally walked back and forth quietly, carrying a sign, and occasionally talking with some media

representatives and law enforcement officials.

14. I remained at the pickets from one to one-and-a-half hours each time.

15. I am sorry to see that the abortionist Victoria continues his deadly work. I would like to picket on the street in front of his residence, but have had to refrain in order to avoid arrest and prosecution under the present picketing ban. Mr. Cramer has indicated that the Police Chief would have instructions to enforce the ban on and after May 21, 1985.

16. I wish to picket on the public street in front of 750 Briar Ridge Drive in order to:

- a) express my opposition to abortion,
- c) express to Victoria my sincere and profound opposition to his performance of abortions,
- b) inform those living in Victoria's neighborhood of the fact that Victoria performs abortions,
- d) inform those living in the area and all who learn of the picketing that

abortion is a matter of concern for local communities and not just an abstract and distant political matter,

e) communicate my opposition to abortion in a location at which my efforts will least interfere with the efforts of sidewalk counselors to contact prospective abortion clients,

f) exercise and express my support for the right to freedom of expression on public streets and sidewalks.

17. Picketing at locations at which Victoria performs abortions would not accomplish what picketing on the public street by his house can accomplish. Such picketing would not serve to inform those dwelling in Victoria's neighborhood. Moreover, the greater media coverage of residential picketing allows us to reach audiences who might not otherwise receive our messages. As an additional concern, we do not wish to interfere with efforts of sidewalk counselors to contact prospective abortion clients; picketing near the Victorias' residence (away from the site of the abortions) removes the

possibility of such problems, while more effectively conveying our messages to the abortionist and those in his community.

18. I regret to see that the Town of Brookfield has so far been able to limit our freedom of expression, and hope that the restrictions will end as soon as possible.

/s/ Sandra C. Schultz
Sandra C. Schultz

(Jurat Omitted in Printing)

JOINT APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF MARY T. BAXA

MARY T. BAXA, being duly sworn on oath,
deposes and says as follows:

1. I have personal knowledge of the facts stated herein, and if called as a witness could testify competently thereto.
2. I am a citizen of the United States and a resident of the City of Glendale, County of Milwaukee, State of Wisconsin.
3. I am married and have two children.
4. I work as a part-time nurse at Milwaukee County General Hospital, in addition to being a housewife and mother.
5. On the evening of May 9, 1985, my husband Michael and I, along with our two children, Jimmy, 3-1/2, and Kevin, 1-1/2, joined Sandy Schultz and others picketing on the public street in front of the residence of abortionist Benjamin Victoria.

6. My family and I attended the picket for about an hour.
7. There were approximately 12 to 15 picketers.
8. The picketers confined themselves to the side of the street in front of the Victoria residence, 750 Briar Ridge Drive, and did not attempt to picket in front of other houses.
9. The picketing was at all times orderly. In fact, when media representatives wanted to talk with us, we asked them to walk along to keep the picket moving.
10. Aside from an initial pro-life cheer and song, the picketing proceeded very quietly. The cheer and song were not especially loud.

/s/ Mary T. Baxa
Mary T. Baxa

(Jurat omitted in printing)

JOINT APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF MARY E. BRUDERS

MARY E. BRUDERS, being duly sworn on
oath, deposes and says as follows:

1. I have personal knowledge of the facts
stated herein, and if called as a witness
could testify competently thereto.
2. I am a citizen of the United States and a
resident of the City of Brookfield,
County of Waukesha, State of Wisconsin.
3. I am married and have five children. My
third grandchild is on the way.
4. I work part-time as a medical assistant
for a doctor in the City of Brookfield.
In addition I babysit and keep house.
5. I am not usually a politically active
person. The pro-life movement has been
an exception for me.
6. Since last winter I have been attending
various pickets sponsored by the Mil-
waukee Coalition for Life (MCFL).

7. When I learned from Sandy Schultz, the president of MCFL, that a picket was scheduled for the residence of an abortionist in the Town of Brookfield, I felt I should participate, since I live fairly close by.
8. On Saturday, April 20, 1985, I joined in the planned picket at abortionist Ben Victoria's house, 750 Briar Ridge Drive. Victoria's house is only about a six minute drive from my house.
9. When police told the picketers to move their cars, I invited them to park at our house, and then shuttled the picketers back to Victoria's house in my car.
10. After that first picket I came back to attend pickets of Victoria's residence on May 9 and May 16. I stayed at the picket on May 9 for about 1-1/2 hours. On May 16 it was raining, and I picketed for about an hour.
11. At the pickets I took part in, everyone was very quiet. No picketers were

shouting, though on one or two occasions someone passing by in a car shouted to us to "Go home." The picketers did sing some songs quietly, until one of the picketers told us to stop.

12. The picketers never trespassed onto private property. In fact, the first time I ever heard any suggestion that people had trespassed was at the Town Board meeting at which the Brookfield Board passed the picketing ban now in effect.

/s/ Mary E. Bruders
Mary E. Bruders

(Jurat Omitted in Printing)

JOINT APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF WILLIAM B. PETERMAN

WILLIAM B. PETERMAN, being duly sworn on
oath, deposes and says as follows:

1. I have personal knowledge of the facts stated herein, and if called as a witness could testify competently thereto.
2. I am a citizen of the United States and a resident of the City of West Allis, County of Milwaukee, State of Wisconsin.
3. I am a minister for the Evangelical Church of God.
4. I am co-founder with Robert C. Braun, plaintiff in this legal action, of the Good Samaritan Outreach Center, which distributed free food and clothing to needy individuals. The Good Samaritan

operated from December 10, 1984, until the end of April, 1985.

5. I am producer and director of various television programs, including the Speaking Out discussion series, which addresses a variety of topics relevant to the concerns of the handicapped, the unemployed, and other needy individuals.
6. On Thursday, May 16, 1985, I joined picketers on the public street outside the residence of Benjamin Victoria, an abortionist, at 750 Briar Ridge Drive in the Town of Brookfield. I attended the picket in order both to express my support and to invite some of the picketers to take part in a session of the Speaking Out TV talk show. I was quite impressed with the sincerity of the picketers I met there.

7. I attended the picket for about an hour and a quarter, beginning at approximately 5:30 p.m.
8. The picketers at all times scrupulously observed the rights of others, including the residents of the abortionist's house. There was no shouting or trespassing. Indeed, I found it truly notable how well-behaved and courteous the picketers were. If my house is ever picketed, I hope the picketers conduct themselves in such a fashion.
9. While attending the picket, I did have the chance to speak with some passersby. One gentleman tried to start an argument, but I made it clear that we did not wish to get into heated or rowdy disputes. A couple came up and politely asked questions of us, which led to a discussion of our concerns and

activities. The police, meanwhile,
were polite and courteous.

Rev. William B. Peterman
William B. Peterman

(Jurat Omitted in Printing)

JOINT APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SANDRA C. SCHULTZ and
ROBERT C. BRAUN,

Plaintiffs,

-vs-

CIVIL ACTION NO.
85-C-1018

RUSSELL FRISBY, GEORGE
R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS,
CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Defendants.

DEFENDANTS PROPOSED STATEMENT OF

UNCONTESTED FACTS

The defendants by their attorney, George
A. Schmus, hereby respectfully submit the
following proposed statement of uncontested
facts:

STATEMENT OF FACTS

The Town of Brookfield is a body
corporate and politic, organized and existing
under the provision of Chapter 60 of the
Wisconsin Statutes.

It is governed by an elected Town Board of three supervisors, one of whom is chairman. It has elected to exercise village powers under Sec. 60.10(2)(c) Wis. Stats.

The Town has a population of approximately 4,300, and an area of 5-1/2 square miles. It is located approximately between the Cities of Brookfield and Waukesha, in Waukesha County. Its principal highway is a section of West Bluemound Road, state highway 18, along which is clustered considerable business and commercial development. The highway is very heavily travelled. The remainder of the town is residential.

The Town has a police department, as authorized by Sec. 60.56 Wis. Stats. It consists of a chief, and 8 officers.

One of the residential areas in the Town is Summit Lawns subdivision, consisting of approximately 51 homes and immediately adjacent is Black Forest Subdivision, which consists of 14 homes. The zoning is single family residential. The subdivision's streets

are blacktop, approximately 30 feet in width, sufficient for one vehicle in each direction. There are no sidewalks, curbs, gutters, or street lights.

One of the homes in the subdivision is that of Dr. Benjamin M. Victoria, 750 N. Briar ridge Drive.

The Milwaukee Sentinel of May 21, 1985, reported that on May 20, 1985, anti-abortion activists picketed Dr. Victoria's home for four hours, and that was the sixth such protest in recent weeks.

The article also noted that the Town Board had adopted an anti-residential picketing ordinance, which would take effect on May 21.

Complaints and reports made to the police department included the following:

- (1) W.A. Smith, 19370 Timberline Drive, who said he and his six year old daughter had been approached by a picket and commented on a resident coming to their town and killing their children. He found this objectionable in front of a six year old, and told her, the picket, so. He told a Town

policeman he wished they could make the pickets leave. He said the pickets were 35-40 in number.

- (2) Mrs. W. A. (Paula) Smith complained that their six year old daughter had been told that their neighbor was killing babies. She described the pickets as a public nuisance, and opined that picketing has no place in a residential area, that it should be done at the doctor's place of business. She also opined that this activity can affect real estate values and sales.
- (3) Audrey Wright, 19650 W. Briar ridge Drive, complained that on a late Saturday morning, in our quiet, peaceful neighborhood, her attention was drawn by a "brouhaha", marchers with posters, shouting "Do you know you have a neighbor who performs abortions", and "You have a neighbor who is a baby killer." She noted the lots in the neighborhood were 3/4 of an acre each, that the Victoria home is four doors away and across the street, and opined that the picketers were definitely creating an annoying disturbance.
- (4) Todd Victoria, age 16, son of Dr. Victoria, complained that on April 20, he was in the yard of the Victoria home when about 15 people started yelling at him, and one took his picture. He states he quickly went inside, he was worried about

being kidnapped. He said he had thought they were going to do something to the car, because at first they wouldn't let him out. "When they let me go they started yelling again". "When I got back there were red things all over and I didn't know what they were. I thought maybe they were preparing to burn the house or something. It scared me."

- (5) Arlene, wife of Dr. Benjamin M. Victoria complained that on April 20, picketing started about 10:30 a.m. and continued for about two hours. The next incident was April 27 about 6:30 in the evening. In the first instance, she was blocked from entering their driveway, their children were asked if they were Victoria's children, and the picketers left hundreds of red ribbons on the shrubs, and put a large sign on the front door of the Victoria home. She complained that they trespassed on her property to do so. She complained that there were six to eight picketing incidents, the dates thereof being recorded by the police; that pickets photographed her son washing the car; that the pickets would shout and yell, especially when a member of the family would drive by. She stated the last time they were at the home, was Sunday May 26, 1985, when they sat in a large school bus and met with reporters.

- (6) Charles Setzke, 19645 Briar Ridge Drive, stated that on Saturday afternoon, while working in his garage, a group of people marched down the street carrying signs about abortion. When they reached his place they turned around to go up the hill, "The lady with the cross told my grandson, who was playing on the driveway, that there was a baby killer living over the hill and that he should not go there. He became scared and came to me and asked me what that lady meant about a man who kills baby's"
- (7) Mary Setzke, 19645 Briar Ridge Drive, complained that on Saturday afternoon, one of the female picketers told me son, age 5, that there was a man up the road from us that killed babies. My son, Brandon, immediately became upset and asked me if the man would kill him, too. He then went into the house and would not come out the rest of the day. For about 1 to 1-1/2 weeks after this occurrence Brandon would not go to his friends house to play because they lived two houses away from where "the man who kills babies" lived..."
- (8) Dave Setzke, age 16, complained that "I was outside on the ledge in front of my house when I clearly heard someone (a lady) say to my nephew, "Little boy there is a man up the road who kills babies."

(9) Corporal Scott Heitman reported that on April 20, 1985, he was dispatched to 750 Briar Ridge Drive, and observed 22 persons picketing in front of the residence. They were walking in the roadway, holding signs that said "baby killer", singing God Bless America. They shouted "baby killer", Dr. Victoria your a killer, save our children killer. Corporal Heitman advised them their cars were in violation of a November 1 to May 1 parking prohibition, and they moved the cars without delay. He noted that he and Chief Ross observed the picketers until 1 p.m. when they all left. "The picketers caused no damage and picketed in an orderly fashion until they left."

(10) Patrolman R. Brueser reported that at 6:20 p.m. on April 27, 1985, he was dispatched to 750 Briar Ridge Drive, talked to one Kay Zibolsky, who said they would cause no trouble but just sign songs while picketing. At 6:50 p.m. she advised they were going to leave on their bus, to get coffee, and would return later. He checked the area at 7:07 p.m. and found no one there, so he resumed normal patrol. He was directed to return to the Victoria home at 8:35, and observed red ribbons tied to the bushes in the yard, a ribbon tied to the door, and a sign on the door with writing on it. Mrs. Victoria was very upset, told him he should have been there to catch whoever did

it. He told her he would give extra patrol as much as he could.

- (11) Officer Daniel Schwann reported that on May 2, 1985, he observed several persons outside the Ben Victoria residence, some 27 in all, that they were non-violent, led by Mrs. Kay Zibolsky. They were a group called "Project save our babies" out of Appleton, Wisconsin. They arrived at 6:30 p.m. and departed at 8 p.m.
- (12) Officer Daniel Schwanz reported on May 9, 1985, he was dispatched to the Victoria home, about 6 p.m. He observed approximately 27 people picketing, also reporters from the major television and newspapers.
- (13) Officer Daniel Schwanz reported that on May 16, 1985, he observed picketers at the Victoria home. "The group was nonviolent at this time and was cooperative". He spoke to a lady who said they would be back on May 20. He asked her if she knew the consequences of the new town ordinance, "she said she did and they they have their alternative methods and the Doctor will be more sorry that the ordinance was passed than before".
- (14) Officer Brueser reported on Monday May 20, 1985, he observed 11 pickets, who walked back and forth in an orderly

fashion, also news media and reporters arrived. He observed them from 1:30 p.m. to 5 p.m. when he was relieved by Corporal Schwanz.

- (15) On Sunday, May 26, 1985, at 3:30 p.m., Officer Brueser and Corporal Daniel Schwanz were on normal patrol at 750 Briar Ridge Drive when they noticed a school bus with about 13 people on it, park in front of this address. They stayed in the area until the bus left about 4:30 p.m.

It is common public knowledge, and we ask the Court to take judicial notice of the fact, that since a decision by the U.S. Supreme Court in 1973, Roe v. Wade, 410 U.S. 113, 35 L. Ed. (2) 147, 93 S. Ct. 705 (Rehearing denied 410 U.S. 959; 34 L. Ed (2) 694; 93 S. Ct. 1409), two groups have formed in our nation. One is known as the pro-life or anti-abortion group; the other is known as the freedom of choice group.

Both have contended strongly for the validity of their respective positions, by newspaper, television, radio, debate, pamphlets, mailings, etc.

The issue in this case is whether an anti-residential picketing ordinance which applies to all groups and all pickets, is constitutional, on the basis that the peace and tranquility of residential neighborhood is of overriding concern.

Submitted concurrently herewith, are supporting affidavits and a copy of the Milwaukee Sentinel article of May 21, 1985.

Respectfully submitted,

George A. Schmus
George A. Schmus
Attorney for the
Defendants

P.O. ADDRESS:

10701 W. National Avenue
West Allis, WI 53227

321-1400

JOINT APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF AUDREY WRIGHT

AUDREY WRIGHT, being duly sworn on oath,
deposes and says as follows:

That she resides at 19650 West Briar Ridge Drive in the Town of Brookfield; that on Saturday, April 20, 1985, her attention was drawn to the street by a disturbance; that upon investigation she found marchers with posters; that the marchers were pleased to have commanded attention and shouted comments such as: "Do you know you have a neighbor who performs abortions?" and "You have a neighbor who is a baby killer."; that the residence that was being picketed is at least four residences from affiant's home and across the street; that the homes in the area are on lots of approximately 3/4 acre each and, therefore, the picketers were a considerable distance from the home that was their objective; that

they were definitely creating an annoying
disturbance.

/s/ Audrey D. Wright
Audrey D. Wright

(Jurat Omitted in Printing)

JOINT APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF TODD A. VICTORIA

TODD A. VICTORIA, being duly sworn on
oath, deposes and says as follows:

That he resides with his parents, who are
Dr. Benjamin and Arlene Victoria, at 750 Briar
Ridge Drive in the Town of Brookfield; that he
is 16 years of age; that on Saturday, April
20, 1985, about 15 people came to affiant's
house; that at first he had no idea who they
were so he went about what he was doing
outside; that a few people started yelling at
him and one took a picture of him; that he
then went quickly inside; that when he found
out who the people were he was scared because
they had his picture and he had heard stories
of these people kidnapping others and that now
that they had his picture, he just wanted to
get out of there; that when he was leaving he
thought the picketers were going to do

something to his car because they wouldn't let him out at first; that when the picketers let him go, they started yelling again; that when your affiant returned home, there were red things all over and he didn't know what they were and thought perhaps the picketers were preparing to burn the house or something; that it scared him.

/s/ Todd A. Victoria
Todd A. Victoria

(Jurat omitted in printing)

JOINT APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF ARLENE VICTORIA

ARLENE VICTORIA, being duly sworn on
oath, deposes and says as follows:

That she resides at 750 Briar Ridge Drive
in the Town of Brookfield; that she is the
wife of Dr. Benjamin M. Victoria, Jr. and the
mother of Todd Victoria; that picketing
started in front of her residence on Saturday,
April 20, 1985 at approximately 10:30 A.M. to
11:00 A.M. and lasted about two hours; that
the second instance of picketing occurred on
April 27, 1985 around 6:30 P.M. on a Saturday
evening; that during the first instance of
picketing on April 20, 1985, your affiant was
blocked from entering her driveway and also
her children were asked by picketers if they
were "Victoria children"; that during the
second occurrence on April 27, 1985, the
picketers left hundreds of red ribbons on

affiant's shrubs and trees and a large sign on the front door which stated "You are a shame to the United States"; that the picketers trespassed on her property when they placed the sign on the front door; that all other picketing instances were recorded by the police department as to dates and times; that there were 6 to 8 instances of picketing all together; that on one such occasion the picketers were taking photographs of affiant's children, especially her older son who was washing his car; that her son observed them taking the photos; that they also took photos of affiant's home and backyard pool and published these in a newsletter which their group mails out to its followers; that the picketers would shout and yell while they were picketing, especially when a member of affiant's family would drive by; that the last time the picketers were at affiant's home was on Sunday, May 26, 1985, where they sat in a

large school bus and met with reporters.

/s/ Arlene Victoria
Arlene Victoria

(Jurat omitted in printing)

JOINT APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF SCOTT M. HEITMAN

SCOTT M. HEITMAN, being duly sworn on
oath, deposes and says as follows:

That he is a police officer of the Town
of Brookfield; that picketing occurred in
front of and adjacent to the property owned by
Dr. Benjamin M. Victoria, Jr. at 750 Briar
Ridge Drive in the Town of Brookfield on April
20, 1985, April 27, 1985, April 29, 1985, May
2, 1985, May 9, 1985, May 16, 1985, May 20,
1985 May 26, 1985; that on April 20, 1985 at
11:00 A.M., your affiant was dispatched to 750
Briar Ridge Drive in the Town of Brookfield,
County of Waukesha, State of Wisconsin on the
call of people picketing in front of the
residence; that upon his arrival he observed
22 persons walking in the roadway in front of
the residence holding signs that said "baby
killer", etc. and singing "God Bless America";

that after singing, the people began to shout at the house "baby killer, Dr. Victoria, you're a killer, save our children killer, etc."; that the picketers' vehicles were parked along the roadway on the south side about 25 yards west of the residence; that your affiant informed the picketers of the Town of Brookfield ordinance of no parking on the town roads between November 1 through May 1 and he told them they would have to move their vehicles or they would all be ticketed; that the people were cooperative and moved their vehicles without delay; that your affiant radioed dispatch at 11:15 A.M. to have Police Chief Ross call the Town Hall to find out if they had an ordinance prohibiting picketing in the Town; that at 11:30 A.M. Chief Ross arrived at the scene and informed your affiant and the picketers that they had the right to picket as long as they did not become disorderly and trespass onto the residence; that at 11:45 A.M. Chief Ross went into the residence and explained the situation

to the Victoria family; that Chief Ross and your affiant observed the picketers until 1:00 P.M. when they all left the scene and that then the scene was cleared; that the picketers caused no damage and picketed in an orderly fashion until they left.

/s/ Scott M. Heitman
Scott M. Heitman

(Jurat omitted in printing)

JOINT APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF REID BRUESER

REID BRUESER, being duly sworn on oath,
deposes and says as follows:

That he is a police officer of the Town of Brookfield; that on April 27, 1985 at 6:10 P.M., he was dispatched to 10-21 W.S.D.; that at 6:15 P.M. he was informed of the picketers that were going to be picketing at 750 Briar Ridge Drive; that at 6:20 P.M. he was 10-60 that location; that your affiant positioned his squad #666 in front of 750 Briar Ridge Drive; that he was informed by a spokesperson, Kay Zibolsky, that they would cause no trouble and that they were just going to sing songs while picketing; that your affiant informed her that he was there to keep the peace and that he didn't expect to have any trouble; that at 6:50 P.M., the spokesperson, Kay Zibolsky, informed him that they were going to

get some coffee and were going to return later that evening and that the people were leaving on the bus; that your affiant was cleared from 750 Briar Ridge Drive at 6:53 P.M.; that at 7:07 P.M. he was again 10-60 at 750 Briar Ridge Drive and found no one in the area and cleared at 7:20 P.M. to resume normal patrol; that at 8:25 P.M. while at a 10-90 at the Edricks Trucking Company, 19455 West Janacek Court, your affiant was dispatched at that time to 10-25 a Mrs. Victoria at 750 Briar Ridge Drive; that he was 10-23 at 8:35 P.M.; that upon his arrival he noticed red-colored ribbons tied to the door of the residence and a sign with writing on it; that your affiant spoke with a Mrs. Victoria and she was very upset at the time; that Mrs. Victoria was accusing your affiant of what had happened to her bushes and that he should have been there to catch whoever did this; that your affiant explained to Mrs. Victoria his position and exactly what he did; that Mrs. Victoria kept blaming your affiant and the Sheriff's

Department for what had happened; your affiant informed her that he would be contacting Chief Ross and would explain the situation to him; that Mrs. Victoria said she would like the Chief to contact her immediately and he informed her that he would try to have the Chief contact her; your affiant assured her as much as he could that he would give extra patrol to her residence; and that he was sorry that he could not have been there to catch the person or persons who tied the ribbons to her bushes; that on Monday, May 20, 1985, your affiant was informed to patrol 750 Briar Ridge Drive in regard to picketers at this address; that at 1:35 P.M. he informed the Waukesha Sheriff's Department of his position and he remained at that location until 2:20 P.M.; that during this period of time there was one vehicle parked on the south side of Briar Ridge Drive, license plate No. H24-077, which was registered to a Joann S. Bushberger, 6126 South Packard Avenue, Cuahy, WI, Apt. #3; that at 2:21 P.M. the vehicle left the area and

affiant cleared the area; that he remained in the vicinity and at 2:40 P.M. he noticed the same vehicle returning to 750 Briar Ridge Drive, so your affiant also returned to the area; that while awaiting for more people to arrive, news media and reporters arrived and at about 3:00 P.M. two more vehicles arrived at 750 Briar Ridge Drive, a vehicle with a plate of U95-564 registered to a Bonnie J. Hammer, 5408 West Spencer Road, Appleton, WI and a vehicle with a plate of W78-137 registered to a Lewis M. Jackles, 39000 Emons Road, Appleton, WI; that at 3:10 P.M. people gathered in front of 750 Briar Ridge Drive and began walking back and forth in an orderly fashion; that your affiant observed these 11 individuals until 5:00 P.M. on this date; that at 5:01 P.M. he was relieved of his duties by Cpl. Schwanz; that on Sunday, May 26, 1985 at 3:00 P.M. your affiant along with Cpl. Dan Schwanz were on normal patrol at 750 Briar Ridge Drive when they noticed a school bus with about 13 people on it park in front of

this address; that your affiant, along with
Cpl. Schwanz stayed in the area until the bus
had left that address and this was
approximately 4:30 P.M.; that at 4:45 P.M.
they cleared this area.

/s/ Reid F. Brueser
Reid Brueser

(Jurat omitted in printing)

JOINT APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF DANIEL J. SCHWANZ

DANIEL J. SCHWANZ, being duly sworn on
oath, deposes and says as follows:

That he is a police officer of the Town
of Brookfield; that on Thursday, May 2, 1985
at approximately 6:42 P.M. while on routine
patrol, he observed several persons outside
the Dr. Benjamin M. Victoria, Jr. residence;
that these persons were picketing this home in
regard to Dr. Victoria's occupation of an
abortion doctor; that there were approximately
27 persons and all were nonviolent at this
time; that the group was lead by a Mrs. Kay
Zibolsky of the group called "Project to Save
our Babies" out of Appleton, Wisconsin; that
the group had arrived at approximately 6:30
P.M. and departed at 8:00 P.M.; that on May 9,
1985, your affiant was dispatched to the
Victoria residence at approximately 6:00 P.M.;

that upon his arrival he observed the anti-abortion group (Project Save our Babies) picketing in front of Dr. Benjamin Victoria's home; that there was approximately 27 people present at the scene; that reporters from the major television and newspapers were also present; that no interviews were taken from your affiant; that on May 16, 1985, your affiant, while on routine patrol, observed the anti-abortion group picketing Dr. Victoria's home at approximately 6:30 P.M.; that he then parked the squad #666 in front of the home to observe their activities; that the group was nonviolent at this time and was cooperative; that he spoke with a lady at the scene and asked her when the group was going to return and she advised your affiant that they would be back on Monday, May 20; that your affiant then asked her if she knew of the consequences of the new town ordinance and she said she did and "that they have their alternative methods and the doctor will be more sorry that the

ordinance was passed than before".

/s/ Daniel J. Schwanz
Daniel J. Schwanz

(Jurat omitted in printing)

JOINT APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF PAULA W. SMITH

PAULA W. SMITH, being duly sworn on oath,
deposes and says as follows:

That she is the wife of Wallace A. Smith
and resides with her husband and daughter at
19370 Timberline Drive in the Town of Brook-
field; that she is a housewife and real estate
broker by occupation; that she found the
picketing disruptive and objectionable; that
when she knew that the picketers were there,
she intentionally rerouted; that the picketers
delighted in the media attention they received
and enjoyed making life for Dr. Victoria and
his family uncomfortable; that every parent
whose child saw the picketers was required to
explain abortion; that your affiant had to
explain it to her six year old because she was
told that their neighbor, Dr. Victoria, was
killing babies; that the picketers were a

public nuisance; that your affiant is in the
rea estate business and knows that anything
of this nature can affect home values and
sales; that your affiant was interviewed by a
TV station and stated that her opinion of the
picketers was that this is a law and order
issue, not an abortion issue; that picketing
has no place in a residential area; that they
can picket the dobtor's place of buisness all
they want.

/s/ Paula W. Smith
Paula W. Smith

(Jurat omitted in printing)

JOINT APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF WALLACE A. SMITH

WALLACE A. SMITH, being duly sworn on
oath, deposes and says as follows:

That he resides at 19370 Timberline Drive
located in the Town of Brookfield, which is
approximately one block from the residence of
Dr. Benjamin M. Victoria, Jr., 750 Briar Ridge
Drive in the Town of Brookfield; that he is
employed by WTMJ Radio; that on the 20th day
of April, 1985, while picketing was occurring
in front of and adjacent to the residence of
Dr. Benjamin M. Victoria, Jr., he walked to
the area being picketed with his six year old
daughter to see what was going on; he saw
about 35 to 40 people walking around and there
was a bus and several cars parked in the area;
pickets were parading in front of the resi-
dence of Dr. Benjamin M. Victoria, Jr. carry-
ing signs denouncing abortion and accusing Dr.

Victoria of performing same; that pickets approached your affiant and his six year old daughter who was walking with him and related to affiant that he must be glad his daughter is alive; then reference was made to Dr. Victoria coming to their city and killing their children; that he found this to be objectionable in front of a six year old and told that to the picket who made that statement; that at this point he and his daughter walked away from the area; that your affiant spoke to the Town police officer in his car which was in the area, and stated that he sure wished they could make the pickets leave.

/s/ Wallace A. Smith
Wallace A. Smith

(Jurat omitted in printing)

JOINT APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF CHARLES SETZKE

CHARLES SETZKE, being duly sworn on oath,
deposes and says as follows:

That he resides at 19645 Briar Ridge Drive in the Town of Brookfield; that he is a painter by occupation; that on Saturday afternoon, April 20, 1985, while he was working in his garage he saw a group of people marching down the street carrying signs about abortion; that your affiant stepped out of his garage to watch them; that when they reached his drive, they turned around to go back up the hill; that a lady with a cross told affiant's grandson, who was playing on the driveway end by the road, that there was a baby killer living over the hill and that he should not go there; that affiant's grandson became scared and came to him and asked him

what that lady meant about a man who kills
babies.

/s/ Charles Setzke
Charles Setzke

(Jurat omitted in printing)

JOINT APPENDIX U

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title omitted in printing)

AFFIDAVIT OF MARY SETZKE

MARY SETZKE, being duly sworn on oath,
deposes and says as follows:

That she resides with her parents at
19645 Briar Ridge Drive in the Town of brook-
field, that she is 22 years of age; that on
Saturday, April 20, 1985, in the early after-
noon, one of the female picketers who was
picketing Dr. Victoria's house, told affiant's
son, age 5, that there was a man who lived up
the road from them who killed babies; that her
son, Brandon, immediately became upset and
asked your affiant if the man would kill him
too; that affiant's son then went into the
house and would not come out for the rest of
the day; that for about 1 to 1½ weeks after
this occurrence, Brandon would not go to his
friend's house to play because they lived 2
houses away from where "the man who killed

babies" lived, as stated by the woman who was picketing.

/s/ Mary Setzke
Mary Setzke

(Jurat omitted in printing)

JOINT APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT OF DAVID SETZKE

DAVID SETZKE, being duly sworn on oath,
deposes and says as follows:

That he resides with his parents at 19645
Briar Ridge Drive in the Town of Brookfield;
that he is 17 years of age; that on Saturday,
April 20, 1985, in the early afternoon he was
outside on the ledge in front of his house
when he clearly heard a lady say to his
nephew: "Little boy there is a man up the
road who kills babies."

/s/ David Setzke
David Setzke

(Jurat omitted in printing)

JOINT APPENDIX W

In the
United States Court of Appeals
For the Seventh Circuit

No. 85-2950

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Plaintiffs-Appellees,

v.

RUSSELL FRISBY, GEORGE R. HUNT, ROBERT
WARGOWSKI, HARLAN ROSS, CLAYTON A. CRAMER, and
the TOWN OF BROOKFIELD,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 85-C-1018-JOHN W. REYNOLDS, Judge

ARGUED APRIL 9, 1986-DECIDED DECEMBER 8, 1986

Before WOOD and COFFEY, Circuit Judges,
and SWYGERT, Senior Circuit Judge.

SWYGERT, Senior Circuit Judge. In this case we consider whether an organized group of anti-abortion activists may be prevented from picketing in front of the private residence of a physician who performs abortions as part of his medical practice. These picketers challenge, on constitutional grounds, a municipal ordinance prohibiting all picketing in residential areas. The suit was filed by two members of the group against the municipality and its officers. After a hearing the district court enjoined the enforcement of the ordinance, ruling that it probably offended the first amendment. Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985). On appeal the decision of the district court is affirmed.

I

The Town of Brookfield, the situs of the controversy, is located in Waukesha County, Wisconsin, not far from Milwaukee. The Town covers an area of about five and one-half

square miles and has a population of approximately 4300. State Highway 18, also known as the West Bluemound Road, is the Town's sole commercial thoroughfare. The remainder of the Town is residential. Brookfield's homes are grouped into subdivisions graced by their developers with imaginative names. One of those subdivisions is called the "Black Forest." It consists of fourteen homes and is zoned exclusively for single-family residences. The streets are thirty feet wide; there are no sidewalks, curbs, gutters, or streetlights.

One of the private residences in Black Forest is owned by Benjamin Victoria, M.D. Dr. Victoria performs abortions at clinics in Appleton, Wisconsin and Milwaukee. Dr. Victoria does not practice medicine in Brookfield. The house in Brookfield is the Victoria family's principal residence.¹

¹ Neither Dr. Victoria nor any member of his family is a party to this action. The record

Plaintiff-appellee Sandra Schultz is a former elementary schoolteacher who describes herself as a full-time housewife and mother. She believes that abortion is a "tragic and immoral injustice." In January of 1984 she helped found the Milwaukee Coalition for Life, a group dedicated to stopping abortion through sidewalk counseling, picketing, and leafletting. Schultz is currently president of the Coalition.²

Plaintiff-appellee Robert Braun is a self-described "community activist" and "advocate on behalf of the poor and unemployed and other needy people." Braun strongly opposes abortion and believes in "caring and supportive alternatives" to the problems posed by an unwanted pregnancy.³

On April 20, 1985 the Milwaukee Coalition

is devoid of reference to any other legal action related to this case.

² Affidavit of Sandra C. Schultz, Record at 16.

³ Affidavit of Robert C. Braun, Record at 15.

for Life sponsored the first of several picket lines in front of the Victoria residence to protest Dr. Victoria's performance of abortions. Between April 20 and May 20 the Victoria residence was picketed on at least six separate occasions. Schultz was present at picketing occurring on April 20, May 9, and May 20. Braun was present on May 16 and May 20. Estimates of the number of picketers on each occasion varied, but the number of picketers on each occasion varied, but the number was never less than ten nor more than fifty. The picketing received extensive press coverage.⁴

The parties disagree as to the conduct of the picketers. The Town submitted sworn affidavits indicating that the picketing was not always calm and orderly. One of the Town's police officers stated that on

⁴ Another anti-abortion group, "Project to Save Our Babies," based in Appleton, Wisconsin was involved in the picketing. Nothing in the record indicates why Dr. Victoria was singled out for those demonstrations.

April 27, 1985 he was called to the Victoria residence by Mrs. Victoria and observed that red ribbons had been tied onto the bushes and door of the house. Red ribbons are a symbol of the pro-life movement in Wisconsin. The ribbon-typing incident took place only minutes after a crowd of picketers had left the Victoria home.⁵

Another Town police officer stated that on April 20 he observed picketers singing "God Bless America" and carrying signs that said "baby killer." At the conclusion of the song the picketers shouted at the house, "Baby killer, Dr. Victoria, you're a killer, save our children," or words to that effect.⁶ At other times the picketers carried signs inscribed with various anti-abortion themes such as "Stop Abortion Now," "Aborted Babies Sold for Cosmetics," "Abortion is Legal

⁵ Affidavit of Reid Brueser, Record at 29.

⁶ Affidavit of Scott M. Heitman, Record at 28.

Murder," and "Forgiveness is Yours for the Asking."⁷

The family of a five-year old boy, residing down the street from the Victorias, stated that on April 20 they saw a group of people marching on the street carrying signs about abortion and that one member of the group, "a lady with a cross," told the little boy that there was a man who lived up the road who killed babies and that the boy should not go there. The child became frightened and asked if the man would kill him too.⁸

A family living one block from the Victorias stated that their six-year-old daughter was told by picketers that Dr. Victoria was killing babies, that she had become frightened, and that they had been forced to explain abortion to her.⁹

⁷ 619 F. Supp. at 795.

⁸ Affidavits of Charles Setzke and Mary Setzke, Record at 25-26.

⁹ Affidavits of Paula Smith and Wallace Smith, Record at 20-21.

The Victorias' son, age sixteen, stated that the picketers took his picture, shouted at him and temporarily blocked his exit from his home.¹⁰ Mrs. Victoria stated that she was blocked from entering her home and that the picketers placed a sign stating, "You are a shame to the United States," on her front door. She further stated that the picketers took photographs of her home and backyard pool and published them in their organization's newsletter.¹¹

Schultz and Braun have sworn that the picketing was entirely peaceful. They claim that the picketers confined themselves to the street, did not block traffic, and did not generate excessive noise. The plaintiffs submitted affidavits which supported their contention that the picketing was polite and restrained.¹² No arrests were made. Indeed,

¹⁰ Affidavit of Todd Victoria, Record at 23.

¹¹ Affidavit of Arlene Victoria, Record at 24.

¹² Affidavits of William Peterman, Mary Bax, and Mary Bruders, Record at 32, 33, 34.

the defendants' own proposed statement of uncontested facts cited an article published in the Milwaukee Sentinel on May 21, 1985 that quoted a "neighbor of Victoria" as objecting more to Dr. Victoria's abortion activities than to the picketing.¹³ The district court found that the picketing had been conducted, "for the most part," in a peaceable and orderly fashion.¹⁴

Schultz has stated that picketing of the Victoria residence is necessary because:

Picketing at locations at which Victoria performs abortions would not accomplish

¹³ Appellants' Appendix at 57, 63.

¹⁴ 619 F. Supp. at 795. Generally, of course, an appellate court is not entitled to pass upon the reliability of evidence presented to the trial court and we need not do so here. One exception to this rule, however, is when a legal dispute centers around the question of whether particular expressions constitute protected or unprotected speech. In these cases appellate courts are permitted a great deal more latitude in their examination of the testimony heard by the district court, despite Rule 52 of the Federal Rules of Civil Procedure. Bose v. Consumers Union, 466 U.S. 485, 503 (1984); Connick v. Myers, 461 U.S. 138, 150 n.10 (1983); NAACP v. Claiborne Hardware, 458 U.S. 886, 915-16 n.50 (1982).

what picketing on the public street by his house can accomplish. Such picketing would not serve to inform those dwelling in Victoria's neighborhood. Moreover, the greater media coverage of residential picketing allows us to reach audiences who might not otherwise receive our messages. As an additional concern, we do not wish to interfere with efforts of sidewalk counselors to contact prospective abortion clients; picketing near the Victorias' residence (away from the site of the abortions) removes the possibility of such problems, while more effectively conveying our messages to the abortionist¹⁵ and those in his community.

On May 7, 1985, after the picketing had started, the Town of Brookfield enacted an ordinance that prohibited picketing before or about the residence or dwelling of any individual, except for picketing during a labor dispute of the place of employment involved in the labor dispute. The Town Attorney became convinced that the new ordinance conflicted with the Supreme Court's decision in Carey v. Brown, 447 U.S. 455 (1980), and instructed the Town Chief of Police to withhold enforcement. Picketing continued and the ordinance was

¹⁵ Record at 16.

repealed. On May 15, 1985 the Town passed a new ordinance, section 9.17 of the General Code. The key provision of the new ordinance reads: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The Town also set forth its rationale for the ordinance:

It is declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this chapter will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth.

There has been no picketing of the Victoria residence since May 21, 1985, the effective date of the picketing ordinance.

On July 2, 1985 Schultz and Braun brought suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief from an alleged deprivation of their rights under the first and fourteenth amendments of the United States Constitution. The defendants are Russell Frisby and George Hunt, Supervisors of the Town Board; Robert Wargowski, Chairman of the Town Board; Harlan Ross, Chief of Police; Clayton Cramer, Town Attorney; and the Town of Brookfield. A hearing on plaintiffs' request for a preliminary injunction was held on August 13, 1985. Finding that the picketers were likely to prevail on the merits, on October 7, 1985 the district court issued its decision granting the picketers a preliminary injunction and providing that the injunction would become permanent, absent an appeal or request for a trial, within sixty days. The basis of the district court's decision was

that the ordinance was not narrowly tailored to advance the Town's asserted interests in protecting the privacy of its citizens and the unobstructed use of the streets and sidewalks. The defendants appealed.

II

It is well-settled law that: "To obtain a preliminary injunction, a plaintiff must show: (1) that he has no adequate remedy at law or will suffer irreparable harm if the injunction is denied; (2) that the harm he will suffer is greater than the harm the defendant will suffer if the injunction is granted; (3) that the plaintiff has a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest." ON/TV v. Julien, 763 F.2d 839, 842 (7th Cir. 1985). The decision to grant or deny a preliminary injunction will not be disturbed absent an abuse of discretion. Burlington Northern RR v. Brotherhood of Maintenance of Way Employees, No. 86-1666, slip op. at 22 (7th Cir. June 4, 1986); Maxims

Ltd. v. Badonsky, 772 F.2d 388, 390 (7th Cir. 1985).

In American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589 (7th Cir. 1986), a divided panel of this court seemed to cast doubt upon the continuing validity of this traditional approach. Building upon an earlier decision of this court, Roland Machinery Co. v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984), American Hospital appeared to suggest that these traditional considerations could be encapsulated in an algebraic formula. 780 F.2d at 593. Subsequent decisions of this court have clarified the meaning of the American Hospital decision. In Lawson Products v. Avnet, 782 F.2d 1429 (7th Cir. 1986), this court re-examined the doctrinal underpinnings of the law of preliminary injunctions and concluded, in light of the issues raised by the American Hospital formula, that "despite possibly contrary readings of recent precedent, the granting of injunctive relief remains a discretionary

equitable remedy." 782 F.2d at 1430. The court in Lawson explicitly endorsed the traditional approach to injunctive relief. "[T]his opinion represent[s] a continued affirmation of the traditional equitable factors governing injunctions and the classic roles of both district and appellate courts," Id. at 1441. "Roland and American Hospital did not change any of the law governing preliminary injunctions." Id. at 1437. A subsequent decision of this court agreed with the position taken by the panel in Lawson. See Brunswick Corp. v. David Jones, No. 85-2980, slip op. at 4-5 n.1 (7th Cir. Feb. 24, 1986) ("American Hospital does not set forth a new standard for granting preliminary injunctions."); see also Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1346 (7th Cir. 1986) (Will, J., concurring).

It should be obvious then, that concerns about the continuing validity of the traditional approach to preliminary injunctive relief in this circuit are misplaced. The law

remains unchanged. Applying the law to the facts of this case, we conclude, for the reasons set forth below, that the district court did not abuse its discretion in granting the preliminary injunction.

III

The first amendment prohibits governmental bodies from enacting laws "abridging the freedom of speech" or "the right of the people peaceably to assemble."¹⁶ These words,

¹⁶ The first amendment provides in full:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Though restricted by its terms to the United States Congress, the first amendment was extended to the states in Gitlow v. New York, 268 U.S. 652 (1925), through the due process clause of the fourteenth amendment. City ordinances are also covered by the first amendment. Lovell v. Griffin, 303 U.S. 444 (1938).

While we treat this case as implicating the free speech rights of the individual

by themselves, seldom serve to illuminate the precise contours of protected expression in cases such as the present one. Picketing, for example, is not an instance of "pure speech" because it usually involves conduct of some sort and may not include verbal utterances at all. Conduct is not always entitled to the same level of protection as pure speech. Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969).¹⁷

plaintiffs, we are not aware of the collective character of picketing and the "close nexus between the freedoms of speech and assembly." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); see also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views bonding together to achieve a common end is deeply embedded in the American political process.").

¹⁷ See Thornhill v. Alabama, 310 U.S. 88, 101 n.18 (1940), for a thorough survey of the many different forms picketing may take. Whether conduct may be considered protectible speech depends on whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spense v. Washington, 418 U.S. 405, 411 (1974); see also Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring) ("Standing, patrolling or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited.").

Nevertheless, "[t]here is no doubt that as a general matter peaceful picketing and leaf-letting are expressive activities involving 'speech' protected by the First Amendment." United States v. Grace, 461 U.S. 171, 176 (1983).

The Supreme Court has often stated that speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to "special protection." Connick v. Myers, 461 U.S. 138, 145 (1983); NAACP v. Claiborne Hardware, 458 U.S. 886, 13 (1982); Carey v. Brown, 447 U.S. 455, 466-67 (1980). The Court has characterized freedom of speech as a fundamental personal right, Schneider v. State, 308 U.S. 147, 161 (1939), and "as the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 75 (1964).¹⁸ The right to picket,

¹⁸ It is not clear that the activity engaged in by the plaintiffs is "political speech" in the strict sense of the term. In Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984), for example, the Court distinguished

however, like all forms of expression, is not absolute and is subject to reasonable regulation. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

There are several important limitations on the scope of the first amendment. The

political speech from "a host of other communications that command the same respect." Among those communications, coincidentally, is the phrase, "Abortion is Murder." It is possible that after the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), opposition to abortion can no longer be characterized as political because, in some sense, the issue has been removed from the political process. In any event, we need not trouble ourselves too much with the proper labelling of the plaintiffs' communications. The Court has stressed that the first amendment fully protects philosophical, social, artistic, economic, literary, ethical, religious, and cultural matters--indeed, any matter of the public interest. See Aboud v. Detroit Bd. of Educ., 431 U.S. 209, 231-32 n.28 (1977); Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 223 (1967).

expressive activity for which a claim of protection is made must be appropriate to, or not incompatible with, its location. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); see also Cornelius v. NAACP Legal Defense and Education Fund, 105 S.Ct. 3439, 3448 (1985); Grayned v. Rockford, 408 U.S. 104, 106 (1972).

In evaluating the appropriateness of expressive activity to a particular location courts employ the "public forum" doctrine. In places which by tradition have been devoted to assembly and debate the state's ability to limit expressive activity is "sharply circumscribed." Perry, 460 U.S. at 45. In places not traditionally devoted to assembly or debate the state may nevertheless create a public forum by intent or custom. In these

limited public forums a state may not enforce exclusions even if it need not have established the forum to begin with. Id. at 45. In addition, certain government properties, even if "public" in other respects, are non-public forums for first amendment purposes. United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981); Greer v. Spock, 424 U.S. 828, 836 (1976); Adderly v. Florida, 385 U.S. 39, 47 (1966).

Regulations enacted for the purpose of restraining speech on the basis of its content "presumptively" violate the first amendment. Renton v. Playtime Theatres, 106 S.Ct. 925, 928 (1986).¹⁹ Content-neutral time, place, and manner regulations, however, are permitted

¹⁹ Absolute prohibitions on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. United States v. Grace, 461 U.S. 171, 177 (1983); Widmar v. Vincent, 454 U.S. 263 (1981). Because the Brookfield ordinance is limited, at least in respect to place, we shall treat it as a time, place, or manner restriction.

if they are narrowly tailored to serve a substantial governmental interest and leave substantial governmental interest and leave open ample alternative avenues of communication. Clark v. Community for Creative Non-Violence, 468 U.S. at 293.²⁰ In City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1552 (7th Cir. 1986), we stated that a time, place, and manner restriction on expressive activity may be sustained only if the Government can show that the restriction (1) is content neutral, (2) serves a legitimate governmental objective, (3) leaves open

²⁰ In the seminal case of United States v. O'Brien, 391 U.S. 367 (1968), the Court articulated the constitutional standard by which regulations like the Brookfield ordinance are judged.

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77 (footnotes omitted).

ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental objective. To establish that a regulation is narrowly tailored the Government must show that there is a "significant relationship between the regulation and the governmental interest...and that less restrictive alternatives are inadequate to protect the governmental interest." Id.

IV

We must first decide whether the street fronting Dr. Victoria's home is a public forum for purposes of the first amendment.²¹ We begin with the proposition that streets have historically been considered particularly appropriate locations for public assembly and debate.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

²¹ The public forum analysis may be less useful in those cases "falling between the paradigms of government property interests." Taxpayers for Vincent, 466 U.S. at 815 n.32; Greenburgh, 453 U.S. at 132.

purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. 496, 515-16 (1939).

The Supreme Court has repeatedly reaffirmed the Hague principle. See, e.g., United States v. Grace, 461 U.S. at 177 ("public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums'"); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 315 (1968) ("streets...are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and abso-

lutely"); see also Carey v. Brown, 447 U.S. at 460; Hudgens v. NLRB, 424 U.S. 507, 515 (1976); Shuttlesworth v. Birmingham, 394 U.S. at 152.

It is not intuitively obvious, however, that all streets, in all places, must automatically be considered public forums. There are no doubt thousands of subdivisions scattered throughout this country, like the one involved in this case, on whose streets little, if any, first amendment activity has ever taken place. Homes like the Victorias' were conceived, built, and purchased as private residences, havens from our loud and contentious inner cities. It seems incongruous to decide that this particular street is a public forum simply because streets in general have historically been centers of expressive activity.²²

²² In ACORN V. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), the court upheld restrictions on solicitation on street intersections and declined to automatically apply the Hague principle merely because the forum in question appeared to qualify as a "street." In ACORN

In Pursley v. Fayetteville, 628 F. Supp. 676 (W.D. Ark. 1986), the district court upheld the constitutionality of an ordinance essentially identical to the ordinance involved in this case. In Pursley the ordinance was also challenged by anti-abortion picketers wishing to picket the residence of a doctor who performed abortions as part of his medical practice. The Pursley court held that streets and sidewalks located in residential areas are not public forums. 628 F. Supp. at 678-90.

Nevertheless, the Supreme Court has

v. City of New Orleans, 606 F. Supp. 16 (E.D. La. 1984), on similar facts, the court held precisely to the contrary. Judge Adams of the Third Circuit has expressed concern that the application of the public forum doctrine may be becoming too mechanical and rigid. "I am concerned that an analysis which relies too heavily on whether an area...has traditionally been regarded as a public forum fails to come to grips with the fact that legal concepts need to evolve to reflect underlying social realities." International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth., 691 F.2d 155, 163 (3d Cir. 1982) (Adams, Jr., statement sur denial of the petition for rehearing). Compare Kamin, Residential Picketing and the First Amendment, 61 Nw. U.L. Rev. 177 (1966) with Haiman, Speech v. Privacy: Is There A Right Not To be Spoken To?, 167 Nw. U.L. Rev. 153 (1972).

always placed all streets, regardless of their differing characteristics, into the same privileged category for first amendment purposes. Twice, for instance, the Supreme Court has upheld the right of demonstrators to picket the streets fronting the private residence of the Mayor of Chicago. Carey v. Brown, 447 U.S. 455 (1980); Gregory v. City of Chicago, 394 U.S. 111 (1969). In neither case was the residential character of the neighborhoods sufficient to transform the streets at issue from public to non-public forums. In Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), the Court rejected the respondents' attempt to equate, for first amendment purposes, streets and the state fairgrounds at issue in that case. "[I]t is clear that there are significant differences between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people

may enjoy the open air or the company of friends and neighbors in a relaxed environment." Id. at 651. Justice White's description of a hypothetical "street" entitled to characterization as a quintessential public forum serves as an accurate description of the Brookfield street in this case. The public forum state of streets and sidewalks may not be altered by legislative fiat. United States v. Grace, 461 U.S. at 180; Greenburgh, 453 U.S. at 133. Despite the tremendous changes in the patterns of residential life since the Hague decision, streets remain proper and natural places for the dissemination of ideas.

A holding that streets located in residential areas are not public forums would represent a radical departure from the general direction of first amendment jurisprudence. Such a holding would effectively place vast areas of this country out of the reach of the protection of the first amendment. Indeed, if streets like that fronting Dr. Victoria's home are not protected by the first amendment, then

primarily residential towns, like Brookfield, may effectively confine the right of their citizens to be exposed to a diversity of views on issues of public concern to those tiny areas of the community classified as "commercial" or "governmental." The importance of free expression to our constitutional scheme of government makes this result inconceivable.

We think that if the issue were squarely presented to the Supreme Court it would hold that all streets, regardless of their situs, are public forums, and we therefore conclude that the Brookfield picketing occurred in a public forum.²³

²³ A time, place, and manner restriction may not be based upon either the content or subject matter of speech. Heffron, 452 U.S. at 648. The Brookfield ordinance on its face bans all forms of picketing without exception. State law, however, prohibits Brookfield from banning labor picketing. Wis. Stat. § 103.53 (1)(e) (1984). Schultz and Braun argue that the Brookfield ordinance thus necessarily incorporates an implied labor exception. In Carey v. Brown, the Supreme Court struck down an Illinois statute that banned residential picketing, but exempted labor picketing. 447 U.S. at 460. The district court in the instant case concluded that this claim was meritless. On appeal, we decline to recon-

This conclusion, however, does not answer the vexing questions that remain. We must also consider whether the Brookfield ordinance leaves open ample alternative channels for communication. Cf. Clark v. Community for Creative Non-Violence, 468 U.S. at 293. For "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). And "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. at 163.

There are no clear guideposts to assist courts in determining when an alternative forum is "adequate." The thrust of the cases seems to be that an alternative forum will not

sider the district court's decision. Our decision, like the district court's, is based solely on federal law.

be judged inadequate because it restricts the quantity of the means of expression. See e.g., Taxpayers for Vincent, 466 U.S. at 803. The Supreme Court seems to have analyzed the issue in terms of its effect on the quality of the means of expression. The restricted forum must constitute a "uniquely valuable or important mode of communication." Id. at 812.

In Renton v. Playtime Theatres, 106 S.Ct. at 925, the Court rejected claims that a zoning ordinance which prohibited motion picture theatres from locating within 1000 feet of a residential zone, church, park, or school did not allow for reasonable alternative avenues of communication where five percent of the land area of the city remained open to unrestricted use as adult theatre sites. In Taxpayers for Vincent the Court upheld a ban on the posting of signs on public property because the ban did not "affect any individual's freedom to exercise the right to speak...in the same place where the posting of signs on public property is prohibited." 466

U.S. at 812 (emphasis added). But in Linmark Associates v. Willingboro, 431 U.S. 85 (1977), the Court struck down a town ordinance that banned the posting of "For Sale" signs on real estate because the ban forced sellers to employ entirely different kinds of advertising, such as the newsmedia.

There is no question that picketing per se is a valuable form of communication. The more difficult question is whether picketing in a residential neighborhood is an essential, "uniquely valuable," element of the message. Schultz and Braun seek to communicate. The question we must answer is whether the plaintiffs may effectively deliver their message elsewhere without, at the same time, changing the character of that message. The Brookfield ordinance restricts picketing to the commercial strip along West Bluemound Road, the Town's main thoroughfare. We think it clear that in so doing the ordinance significantly impacts upon the quality of the means of expression Schultz and Braun have chosen to

communicate their message. Forcing Schultz and Braun to picket in non-residential areas would be, in effect, to force them to engage in an entirely different form of expressive activity. Consigned to the "safe" and busy area along Bluemound Road, they may be conveniently ignored by passersby. They may be written off as eccentric and irrelevant nuisances. Residential picketing, however, does not permit the citizens of Brookfield to ignore or trivialize the message the picketers wish to communicate. Residential picketing, quite literally, brings the message home. More importantly, the fact that the message may reach and disturb families and children is clearly part of the point of the picketing, for, to a certain extent, the picketers seek to communicate their concerns about a perceived assault on the family and on childhood itself. There can be no better place to convey those concerns than in a residential area. The disturbance occasioned by the residential picketing in this case is actually

one measure of its unique value as a means of communicating Schultz' and Braun's concerns. We conclude, therefore, that the Brookfield ordinance does not provide ample, alternative channels of communication.

VI

Neither Schultz nor Braun has been charged with a violation of the ordinance. Nothing in the record indicates that the ordinance has been enforced against anyone else. The general rule is that, "constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." Taxpayers for Vincent, 466 U.S. at 798. This rule reflects both the personal nature of constitutional rights and prudential limitations on constitutional adjudication. New York v. Ferber, 458 U.S. 747, 767 (1982). See generally Broadrick v. Oklahoma, 413 U.S. 601 (1973). In some cases, however, courts have invalidated statutes "on their face" without inquiring into their particular applications to specific

facts. An ordinance may be constitutionally invalid on its face "either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" Taxpayers for Vincent, 466 U.S. at 796. In either case illegitimate enforcement of the statute against the complaining party will not be required. An ordinance is unconstitutional in every conceivable application because "any enforcement carries with it the risk that the enforcement is being used merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit." Id. at 797 n.14 (emphasis in original). This is almost a rule of per se unconstitutionality. Laws invalidated on this basis fail to define a "central core of constitutionally regulable conduct." New York v. Ferber, 458 U.S. at 771 n.26; Parker v. Levy, 417 U.S. 733, 760 (1974); CSC v. Letter Carriers, 413 U.S. 548, 580-81

(1973). See generally, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

An ordinance may also be constitutionally invalid on its face if it is written so broadly that it may inhibit--have a "chilling effect" on--the protected speech of third parties. Taxpayers for Vincent, 466 U.S. at 796; Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). This form of the overbreadth doctrine--the "classic" form of the doctrine--relaxes ordinary standing rules by permitting parties to raise the rights of third parties not before the court.²⁴ Though the Court has cautioned that constitutionally invalid overbreadth must be "substantial" where conduct and not merely speech is involved, and that the doctrine itself should be invoked "only as a last resort," Broadrick v. Oklahoma, 413 U.S. at 613, the Court has often invalidated statutes on the basis of this

²⁴ Declaratory judgments may serve much the same purpose. 28 U.S.C. § 2201

doctrine. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Gooding v. Wilson, 405 U.S. 518 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). See generally Monaghan, Overbreadth, 1981 S. Ct. Rev. 1.

These two types of facial challenges to the constitutionality of legislative enactments are often conflated. "'[O]verbreadth' is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though as applied to him the statute would be constitutional. 'Overbreadth' has also been used to describe a challenge to a statute that in all its applications directly restricts protected first amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Secretary of State of Maryland v. J. H. Munson Co., 467 U.S. 947, 965-66 n.13 (1984) (citations omitted); see also Central Hudson Gas & Elec. v. Public

Serv. Comm'n, 447 U.S. 557, 565 n.8 (1980).

In this case we are not presented with an instance in which the application of the classic overbreadth doctrine is appropriate. The facial challenge to the Brookfield ordinance is of the per se type upheld in J. H. Munson.

The complaint in this case is not that the ordinance might violate the rights of other potential picketers, but rather that the ordinance is unconstitutional and would constitute a direct restriction on protected first amendment activity if applied to Schultz and Braun and would be per se unconstitutional if applied against any type of picketing or picketer. The Supreme Court has frequently invalidated statutes or ordinances that impinged upon protected expression "on their face" on the basis that no conceivable application of the statute could be constitutional. See, e.g., Saia v. New York, 334 U.S. 558 (1948); Stromberg v. California, 283 U.S. 359 (1946); Lovell v. Griffin, 303 U.S. 444

(1938).

The district court based its decision to issue the preliminary injunction in this case on a finding that the picketers were likely to prevail on the merits because the ordinance was not narrowly tailored to advance the Town's legitimate interest in protecting the privacy of its citizens or the public use of the streets and sidewalks. The requirement that a legislative enactment affecting expressive activity be narrowly tailored means simply that the questioned regulation "may extend only as far as the interest it serves." Central Hudson, 447 U.S. at 565. The state cannot "completely suppress information when narrower restrictions on expression would serve its interest as well." Id. Since a proposed restriction on expressive activity must be narrowly drawn to further a significant governmental interest, the Government must demonstrate that its objectives will not be served by means less restrictive of first amendment freedoms. ACORN v. Frontonac, 714

In Central Hudson, for example, the Court struck down a state regulation that prohibited an electric utility company from advertising to "promote the use of" electricity. The regulation was not narrowly tailored because the state's interest in encouraging its citizens to conserve energy did not support a ban against a utility that might seek to "promote the use of" more efficient electrical

²⁵ The Third Circuit has held that the proponent of a regulation of expressive activity in a non-public forum need not prove that there are less restrictive alternatives available, but merely that ample alternative avenues of communication remain open. Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182, 186 (3d Cir. 1984). This court has suggested that Munhall creates a conflict with the Eighth Circuit's decision in Frontonac. Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1253-54 (7th Cir. 1985). Because we read Munhall as being confined to non-public forums, we believe any conflict is more apparent than real. In any case, Kenosha clearly suggested, and City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547 (7th Cir. 1986), conclusively decided, that this court would follow the Eighth Circuit's view. We note in passing that the analytical task assigned to courts by these two standards are, in any event, closely related.

products. In J. H. Munson, 467 U.S. at 965-68, the Court struck down a state statute that prohibited a charitable organization from spending more than twenty-five percent of solicited funds on administrative costs. "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." Id. at 966. The means chosen to further the state's interests were judged "too imprecise" to save the statute from a facial challenge. We hold that the Brookfield ordinance is similarly flawed. The ordinance does not represent a sufficiently narrow and precise response to the concerns motivating its passage. There are less restrictive means available to the Town to address its legitimate concerns. Picketing is not by its very nature an activity inherently disruptive of the coherency of an American neighborhood. Although we do not doubt that

the secondary effects of picketing--noise, obstructiveness, trespass, litter, etc.--may be regulated, picketing may not be barred altogether merely because it occurs in a residential area. An ordinance which attempts just that can never be constitutional.

VII

In order to justify an impairment of expressive activity Brookfield must demonstrate the existence of a significant governmental interest. Any number of such interests are imaginable. It is not our place, however, to invent justifications for the Brookfield ordinance. In this case any speculation would be utterly pointless since the Town itself has indicated that it enacted the ordinance to serve two interests: (1) the privacy interests of its residents; and (2) its interest in regulating vehicular and pedestrian traffic patterns. Of these two, it is clear that the privacy issue is the most important justification for the statute and the issue on which the parties and the district court focused

their attention. Although the interest in regulating traffic is legitimate, it constituted only a minor part of the Town's interest in the ordinance. Moreover, there has been no evidence introduced that the picketers in any way interfered with the flow of traffic. Indeed, the Town's own evidence clearly indicated that the picketing had a negligible impact on traffic. Even the statements of the Victoria family that their egress from their home was impeded must be understood not as impairments to traffic patterns, but as assaults on the physical integrity--the privacy--of the family. We will treat the privacy issue as the sole motivation for the ordinance.

The stated interest of the Town in protecting the privacy of its residents is clearly a significant governmental interest. When the privacy of the homestead itself is in question, the rights of individuals to be let alone sometimes outweigh the rights of others to communicate. In Rowan v. Post Office

Department, 397 U.S. 728 (1970), the Court upheld postal regulations that permitted a householder to request the United States Post Office Department to stop the flow of unwanted or offensive mail. In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Court upheld Federal Communication Commission regulations restricting the type of speech that may be heard on the airwaves, and thus, in the home itself. The right to privacy is at its strongest when expression intrudes into the privacy of the home or is aimed at captive or unwilling audiences. Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975). We believe the Town's interest in protecting the residential character of the community is of the utmost importance. Nevertheless, the right to privacy "must be placed in the scales with the right of others to communicate." Rowan, 397 U.S. at 736. The balance, in this case, tips toward the right of the picketers to disseminate their views.

The conflict between the first amendment

and the desire of municipalities to protect the sanctity of the home has occasioned much discussion in the courts of this land. In three cases decided in 1943 the Supreme Court struck down restrictions on the right of religious organizations to engage in door-to-door solicitation for the sale of religious literature and the propagation of their views. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Douglas v. Jeannette, 319 U.S. 159 (1943). These cases involved members of the Jehovah's Witnesses, a religious organization particularly unpopular with government officials in the 1940's. Their literature was described by the Court as "provocative, abusive, and ill-mannered." Murdock, 319 U.S. at 115-16. In affirming the right to engage in such communication, the Court observed: "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if

vigorous enlightenment was ever to triumph over slothful ignorance." Martin, 319 U.S. at 143. "Plainly a community may not suppress... the dissemination of views because they are unpopular, annoying or distasteful." Murdock, 319 U.S. at 116. Dissenting in both Murdock and Martin and concurring in Douglas, Justice Jackson chastised the Court for "denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the marketplace and the street." Douglas, 119 U.S. at 181 (Jackson, J., concurring). Though there are, of course, important differences between those cases and our own, the issues they raise are not fundamentally dissimilar. We note that in Murdock a municipal ordinance that banned all solicitation for orders of merchandise within the town limits had been narrowly construed by the Pennsylvania courts as banning only residential solicitation "door to door and house to house." Murdock, 119 U.S. at 117 n.10. The Court nevertheless rejected the constitution-

ality of the statute even when so constructed. "The ordinance is not narrowly drawn to prevent or control abuses or evils arising from [residential solicitation]. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless [a] tax is paid. That restraint and the one which is city-wide in scope are different only in degree. Each is an abridgment of freedom of press....They stand or fall together." Murdock, 119 U.S. at 117. We read Murdock as standing for the proposition that the residential situs of expressive activity subject to regulation is of no constitutional significance. The constitutionality of a limitation on communication may not depend on whether the communication is directed at city hall or at the home.

At the same time concerns about the effects on individual privacy that any particular activity may have may be taken into account when enacting legislation. "In the

sphere of collision between claims of privacy and those of free speech or free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." Erznoznik, 422 U.S. at 208. Home-owners in communities like Brookfield have some reasonable expectation of privacy. People who care passionately about a particular political or social issue have a right to be heard. On the one hand, "[no]thing in the Constitution compels us to listen or view any wanted communication, whatever its merit." Rowan, 397 U.S. at 737. On the other hand, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." Erznoznik, 422 U.S. at 210. Of course, to say that a municipal enactment must strike a sensitive balance between the right of free expression and the right to be free from expression is to beg at least two important questions. The first is what our society

has come to mean by the use of the term "home." The second is how courts can determine whether an audience is willing or unwilling to receive a specific message.

No Supreme Court has defined the outer limits of what is meant by the concept of "home." Is a home strictly limited to the four walls of a building serving as a private residence? Or does the concept of home somehow encompass an area of peace and security related to, but not strictly limited by, the walls of a house? In Kovacs v. Cooper, 336 U.S. 77 (1949), the Court upheld restrictions on excessively loud sound amplification in residential neighborhoods. In Kovacs there was no actual physical invasion of the walls of a house, but excessive noise may sometimes serve as a more than adequate substitute for physical intrusion. By the same token, in a long line of cases, the Court has struck down restrictions on door-to-door solicitation or canvassing activities although these activities clearly brought the speaker

closer to the actual physical shell of the home. We doubt that any exact definition of home is possible and we shall not attempt one here. The concept of home is tied to social and cultural conditions and those are constantly in flux. Nevertheless, though the cases are difficult to synthesize, it is fair to say that the Court has adopted a rather narrow understanding of the concept of home. In no case has the Court's understanding of the concept of home extended to encompass quiet and orderly demonstrations on the streets and sidewalks.

It is also unclear how one is to separate conceptually, or actually, willing from unwilling listeners. One person's heresy is another's orthodoxy; the tamest discourse may be heard as a thunderous philippic. Maybe all of Dr. Victoria's neighbors disapproved of the plaintiffs' picketing, but maybe somewhere in the community the picketers' chants fell on sympathetic ears. What seems relatively clear is that a municipality may not decide for its

citizens what messages they may receive. Privacy, by definition, is a right that adheres to the person, and not to the community. The Town of Brookfield has usurped its citizens' right to decide for themselves what they shall, or shall not, hear and see. We do not live in a society where that is acceptable.

In Gregory v. City of Chicago, 394 U.S. 111 (1969), demonstrators pressing for desegregation of the City of Chicago's schools picketed in front of the mayor's house. The picketing attracted large numbers of hostile bystanders. Fearful of impending civil disorder, the police ordered the demonstrators to disburse. They refused, were arrested, and were convicted of disorderly conduct. The Court reversed the convictions for lack of evidence that the demonstrators' conduct was, in fact, disorderly. "This," wrote Chief Justice Warren for the Court, "is a simple case." 394 U.S. at 111.

Justice Black concurred in the judgment of the Court, but could not agree that the

case was simple. "Plainly...no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people...for homes, wherein they can escape the hurly-burly of the outside business and political world." 294 U.S. at 118 (Black, Jr., concurring). Without limitations on speech-related conduct, "homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life." 394 U.S. at 125.

The force of Justice Black's views was acknowledged in Carey v. Brown. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey, 447 U.S. at 471. But the Town's interest in protecting the privacy of

the home cannot justify draconian prohibitions on picketing. The Carey Court, for instance, acknowledged that "[n]umerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests." 447 U.S. at 469. Moreover, a certain amount of discord is to be expected, even desired, as a secondary effect of expressive activity. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); see also Edwards v. South Carolina, 372 U.S. 229, 237 (1963). To an extent, disruption is the price of living in a free society.

Our task would be easier if we had the benefits of an ample body of law addressing the issues raised by this appeal. Unfortunately, no case from this court is directly on point. In Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978), this court held that the Village of Skokie, Illinois could not prohibit a planned demonstration by members of the National Socialist Party of America despite the fact that a clear majority of the Village's residents would find the demonstration "an invasion, intensely menacing no matter how peacefully conducted." 578 F.2d at 1206. The court rejected the Village's attempt to justify restrictions of the planned demonstration on the basis of its citizens' substantial privacy interests. Id. at 1207. The Skokie demonstration, however, was focused on the Village Hall, with only inevitable, incidental intrusions on peoples' homes.²⁶

²⁶ In Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980), cert. denied, 450

Our research has discovered only two federal appellate decisions on point. In Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), cert. denied, 421 U.S. 971 (1975), the Tenth Circuit rejected the exact constitutional objections raised in this case against a virtually identical municipal ordinance. In Garcia demonstrators picketed the residence of the mayor of the town. The town enacted an ordinance making it unlawful for any person to picket before or about the residence or dwelling of any individual. The court upheld

U.S. 913 (1981), the court upheld restrictions on demonstrations at the Russian Mission to the United Nations relying, in part, on the privacy interests of the people living near the Mission. In Carey v. Brown the Supreme Court specifically declined to decide whether a statute that prohibited all residential picketing could be constitutional. 447 U.S. at 459 n.2. This court had previously chosen to do likewise. Brown v. Scott, 602 F.2d 791, 795 n.6 (7th Cir. 1979). The trial court in that case, however, had found it necessary to decide the issue and had held that a total ban on residential picketing was constitutionally premissible. 462 F. Supp. 518 (N.D. Ill. 1978); see also People Acting Through Community Effort v. Doorley, 338 F. Supp. 574 (D.R.I. 1972), rev'd, 468 F.2d 1143 (1st Cir. 1972).

the ordinance holding it to be a "valid exercise of governmental power." 507 F.2d at 545.

In Davis v. Francois, 395 F.2d 730 (5th Cir. 1968), the Fifth Circuit struck as violative of the first and fourteenth amendments a municipal ordinance making it unlawful for more than two people to picket in front of a residence, a place of business, or a public building. Pursuant to this ordinance demonstrators picketing the local school board building were arrested. The Fifth Circuit held that the ordinance had not been narrowly or precisely drawn to redress proscribable conduct. Id. at 735-36. While the ordinance in Francois is not exactly like the one in the present case,²⁷ it is similar enough to be relevant to our analysis. We think Francois more accurately represents the direction of

²⁷ The Francois ordinance is broader as to place, but narrower as to manner, i.e., it is not limited to residences, but neither does it eliminate picketing entirely in the affected areas. See 395 F.2d at 732.

the first amendment law than does the decision of the Tenth Circuit in Garcia.

The defendants rely heavily on the decision of the Wisconsin Supreme Court in City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971). In Wauwatosa the court upheld the constitutionality of a municipal ordinance virtually identical to that struck down in Carey v. Brown. In light of Carey we doubt that Wauwatosa is a viable precedent. Moreover, we do not believe that the Wauwatosa court had a realistic view of the current status of the American family and the American home. "Home," we are told, "is where the wife expects, in addition to the work of the household and the care of the children, to have some moments of peace and calmness." 49 Wis. 2d at 411, 182 N.W.2d at 537. In State v. Schuller, 372 A.2d 1076 (Md. 1977), Maryland's highest court, reviewing a nearly identical statute, rejected the approach of Wauwatosa. "[W]e believe that the statutory ban on all residential picketing is invalid on

its face as violative of the right to freedom of speech." 372 A.2d at 1082.

Finally, in two recent cases, this court struck down far narrower restrictions on expressive activity at least as intrusive on residential privacy as the picketing that occurred in this case. City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985). In both Witseka and Kenosha, relying on a long line of Supreme Court solicitation cases,²⁸ we invalidated limitations on door-to-door solicitation. Yet, in door-to-door solicitation the unwilling target of the message is actually forced to confront the speaker. The householder cannot draw the blinds to shield herself from an unwelcome visage or turn up the stereo to drown out an unpleasant voice. In neither Kenosha nor Witseka did the municipality attempt a total

²⁸ See Kenosha, 767 F.2d at 1251 (listing Supreme Court solicitation cases).

ban on residential solicitation. Although this is not a case of first impression, neither is it a case whose result is dictated by stare decisis. Nevertheless, we believe our decision is fully consonant with the first amendment jurisprudence of the Supreme Court and with our own previous decisions.

VII

By deciding this case the way we do, we do not express approval of the alleged conduct of the picketers in front of Dr. Victoria's home. There is nothing laudable about frightening children or harassing their parents. Sensitivity to the rights of unborn children is not likely to be advanced by insensitivity to rights of already living children. We point out, however, that the charges levelled against the picketers remain merely allegations. We are not asked to pass judgment upon the conduct of the plaintiffs, but rather on the constitutionality of an ordinance banning even peaceful and orderly picketing. If the conduct of anyone within the municipal boun-

daries of Brookfield is objectionable, then the Town may pass laws directed at that part of the conduct that is legally objectionable. To a large extent the Town already has the legal weaponry necessary to defeat disruptive and constitutionally unprotected conduct. Brookfield, for example, has ordinances on its books that prohibit the obstruction of streets and sidewalks, loud and unnecessary noise, destruction of property, littering, criminal trespass to land, criminal trespass to dwellings, and disorderly conduct. 619 F. Supp. at 794-95. Picketers may be prosecuted each time they violate any of those provisions. At oral argument, counsel for the Town asserted that these existing ordinances are difficult to enforce. Any difficulties in the enforcement of these ordinances cannot justify the total ban on residential picketing. Where the first amendment is involved, civil authorities may not take legislative shortcuts.

It is most assuredly not our place to attempt to draft a constitutionally valid

ordinance regulating residential picketing. Nevertheless, an ordinance is more likely to be constitutionally acceptable if it does not incorporate expressive activity as part of the definition of the proscribable conduct. An ordinance, for example, making it unlawful to distribute circulars or handbills without the permission of the chief of police would certainly violate the first amendment even if the justification for such an ordinance is the municipality's legitimate interest in controlling litter. On the other hand, a statute simply making it unlawful to litter would almost certainly not offend the Constitution. See Schneider v. State, 308 U.S. at 162-63. A municipality's right to regulate the time, place, and manner of communication necessarily incorporates the duty to balance the right of expression against the homeowner's right to privacy. The delicacy of that balance can never justify the simple solution of doing away with picketing altogether.

IX

The first amendment, Justice Holmes wrote, "is an experiment, as all life is an experiment." Abrams v. United States, 250 U.S. 616, 630 (1920) (Holmes, J., dissenting). It is a test of the proposition that a nation may permit its decisions to be questioned, examined, discussed, and challenged--and yet survive. Persecution for the expression of opinions is, Holmes wrote, "perfectly logical." Id. "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent...or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises." Id. We live in a society confident of its power and its premises. Our self-confidence has not, however, led us to stifle voices of protest and discontent. Our "profound national

commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), is a testament of faith in the good sense and common decency of the American people--a belief that the people, having examined the assumptions of their society, will choose to reaffirm them.

Permitting the premises of our society to be constantly questioned means that there will always be times when people with lost causes and unfulfilled dreams disturb the serenity of our communities. We ought not to be overly troubled by the resulting clamor. It is the inevitable consequence of living in a great and restless democracy.

Affirmed.

COFFEE, Circuit Judge, dissenting. The Majority inaccurately characterizes this case as an attempt by the Town of Brookfield to deprive the picketers of their right to be heard: "People who care passionately about a political or social issue have a right to be heard." Majority opinion at 25. The picketers are not being denied their right to be heard. They may advertise their grievances in any non-residential area. They can communicate their message through other media--direct mail, radio, television, newspapers or telephone. We are called upon to balance the right of the picketers to advertise their grievance against the right of innocent people (Brookfield residents) far removed from the controversy to enjoy the peace and tranquility of their home in an area zoned residential where little toddlers romp and play. Citizens also have a right to the quiet, comfort, and privacy of their own home, free from the cacophony of sounds and other disturbances which all too often penetrate and invade our

lives once outside the peaceful sanctity of their domicile. The controversy before us involves the Town of Brookfield, Wisconsin's attempt to balance the right of privacy against the right of freedom of speech under circumstances that I believe reasonably justify the Town's decision to strike the balance in favor of privacy while not depriving the picketers of their right to advertise their grievance. Although this court has an obligation to protect the rights of individuals, "we must not [ever] lose sight of the common good of all mankind." United States v. Madison, 689 F.2d 1300, 1314 (7th Cir. 1982). For every right, there is a corresponding obligation. The picketers have a right to express their concerns about abortion, but they also have an obligation to respect and honor the rights of others, especially those foreign to the controversy such as Dr. Victoria's innocent neighbors and their infant children who also have the right to enjoy the privacy, peace and tranquility of

their own homes. These corresponding obligations preserve the order and organization that make the exercise of our individual rights a reality instead of an illusory promise as is true in many other countries. Ours is a government of laws, not of men, reflecting the beliefs of the Majority enacted through their legislative bodies (Town Council) and protecting individual rights, but not at the expense of society as a whole. We must not lose sight of the common good of all mankind in our zealously to protect individual rights. As the Supreme Court explained:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

Because I cannot agree with the Majority that a person's right to privacy must give way to unsolicited, and disruptive conduct which not only intimidates but harasses innocent people in the privacy of their own homes, I dissent.

Even though ample alternative methods of communication are available to the picketers (direct mail, radio, television, newspapers or telephone), the Majority forces the Town and its residents to tolerate this unjustified assault on the residents' right of privacy.

The right of free speech guaranteed by the First Amendment to our Constitution has always been considered as essential to our survival as a free nation. "[F]ree speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Just as the courts have recognized the fundamental importance of free speech to a free society, they have also acknowledged that the right of free speech is not absolute: "[i]t is well understood that the right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). Justice Holmes stated: "The most stringent protection of free speech would not

protect a man in falsely shouting fire in a [crowded] theater and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). Although freedom of speech is fundamental, it does not mean "that everyone with opinions or beliefs to express may address a group at any public place and at any time." Cox v. Louisiana, 379 U.S. 536, 554 (1965). The Supreme Court stated in United States v. Grace, 461 U.S. 171, 177 (1983), "[w]e have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderly v. Florida, 385 U.S. 39, 47-48 (1966)). As Justice Black noted in his concurrence to Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (emphasis added):

"Were the authority of government so trifling as to permit anyone with a complaint to have vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome

into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purpose for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and daily way of living, would have to have their doors thrown open to all who desire to convert the occupants to new views, new morals, and a new way of life."

Consequently, protected expression is subject to limitation by the state under certain circumstances. See United States v. O'Brien, 391 U.S. 367 (1968). As the Supreme Court noted 46 years ago,

"[i]t is equally clear that a state may by general and non-discriminatory legislation regulate the time, places, and the manner of soliciting upon its streets and of holding meetings thereon; and in other respects safeguard the peace, good, or comfort of the community, without unconstitutionally invading the liberties protected by the [First Amendment]."

Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (emphasis added). The state's right to limit expression becomes less restricted as the form of expression moves away from pure speech to include an element of conduct

(picketing). "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage and Ice Company, 336 U.S. 490, 502 (1948). As the Supreme Court noted in Cox, "[t]he examples are many of the application by this court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." 379 U.S. at 563.

The conduct of the picketers in this case, picketing in a private residential neighborhood, although intertwined with an element of expression, has long been recognized as subject to state regulation:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation."

Bakery Drivers Local v. Wahl, 315 U.S. 769, 776-777 (1940). Thus, although picketing contains an element of speech,¹ the Supreme Court has never recognized picketing as the "inevitable legal equivalent" of speech. Hughes v. Superior Court, 339 U.S. 460, 465 (1950). Further, the manner in which the picketing proceeds has never been considered as relevant to the state's power to regulate or prohibit picketing: "[a] state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." Bakery & Pastery Drivers, etc. v. Wahl, 315 U.S. at 775 (emphasis added).

The state's interest in regulating expressive conduct is even greater where the expressive conduct threatens to (or does) impinge on the exercise of equally important constitutional rights (privacy) of others.

¹ "[t]hat is arguments, usually on a plaque card, made to persuade other people to take the picketers side of a controversy." NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760, 377 U.S. 58, 77 (1964) (Black, J., concurring).

"Although American constitutional jurisprudence, in the light of the First Amendment, has been zealous to preserve access to public places for purposes of freedom of speech, the nature of the forum and the conflicting interest involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."

Lehman v. City of Shaker Heights, 418 U.S. 298, 302, 303 (1974) (emphasis added). Thus, when evaluating a state's regulation of protected expression, we must consider:

"The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.' Although a silent vigil may not duly interfere with a public library . . . making a speech in the reading room almost certainly would. That same speech would be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

Graynard v. City of Rockford, 408 U.S. 104, 118 (1972) (citations omitted). In this case, as the Majority acknowledges, the right of the picketers to express their opposition to Dr. Victoria's medical practices on a public street in a residential area in Brookfield, Wisconsin clashes directly with the right of

Dr. Victoria and his innocent neighbors and their infant children to retreat to the privacy of their homes, undisturbed by the "public world" that vies for the undivided attention the moment they leave the sanctity of their own property. The picketing might very well be "perfectly appropriate" at the location of Dr. Victoria's clinic, but it is clearly inappropriate in front of his private residence. The right of a person to the privacy of his or her own home is undisputed. See Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Douglas, J., dissenting). Further, when the right of privacy clashes with the right of free expression, the interest in privacy has not always come out second best. Thus, in Kovacs v. Cooper, 336 U.S. 77, 81 (1949), the Supreme Court upheld an ordinance which prohibited the use of sound trucks on residential streets. The court explained that the interest in preventing interference with the activities of residents "or the quiet they

would like to enjoy" was sufficient to justify the ordinance involved. Likewise, in Rowan v. United States Post Office Department, 396 U.S. 728, 736 (1970), the Court upheld as constitutional a federal statute that empowered the post office, upon request of an individual, to require that a sender of unsolicited mail remove the name and address of the individual from its mail lists. Thus, the individual was able to stop the delivery of unwanted information to his private residence without interfering with the mailer's general right to disseminate its materials to "willing" recipients. See Kovacs, 336 U.S. at 88. The court recognized "the very basic right to be free from sights, sounds, and tangible matter" in the privacy of our homes. Clearly, as Justice Black noted in his concurring opinion in Gregory:

"No mandate in our Constitution leaves states and governmental units powerless to pass laws to protect the public from the kind of boisterous, threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and

political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, and hospitals."

394 U.S. at 118. As important as free speech is to preserving our freedom, the right of privacy which ensures the opportunity for peace, tranquility, comfort, and personal solace away from the often overwhelming bombardment of unsolicited communications from political, commercial, and religious groups, enterprises, and organizations cannot be any less important in a society whose existence depends on the ability of each individual (as well as the majority) to conscientiously exercise his or her judgment in the conduct of their own affairs and those of their locality and nation. The conscientious exercise of judgment upon which we depend can hardly be exercised in the absence of the privacy necessary for contemplation and reflection. To hold that the right of free speech outweighs all other individual rights, as the Majority does in this case, goes far beyond the boundaries the Supreme Court has estab-

lished when considering the limitations on the right of free speech. The Majority's unwarranted expansion of the right to freedom of speech under the First Amendment lays a foundation for transforming the right of free speech from a tool of freedom and democracy into a weapon of injustice. See Cox v. Louisiana.

Although the Majority acknowledges that Dr. Victoria and his neighbors have a right to privacy and recognize a need for balancing that right against the picketers' right of expression, the balancing test applied by the Majority, reflects its determination unsupported in case law that the right of free expression always supersedes the right to privacy. Is the Majority not making the same error of judgment that the civil libertarians in the 1960s made when attempting to overhaul the very foundation of our criminal law? I question whether the Majority's holding brings us closer to falling prey to the same type of unrealistic interpretation of an individual's

rights as contrasted with the good of all mankind, which is primarily responsible for our present inability to adequately protect society from criminal activity. The Majority, in requiring the Town of Brookfield to substantiate that its ordinance is the least restrictive means to protect its residents' right to privacy misconstrues decision of the United States Supreme Court, and not only imposes a greater burden on all municipalities but effectively precludes a state from protecting the rights of individuals in their homes from shouting, "noisy, marching, tramping picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." Cox, 394 U.S. at 126 (Black, J., concurring).

"[S]treets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes."

Gregory, 394 U.S. at 125 (Black, J., concurring).

In so doing, the Majority makes the unwilling

recipient of the message carried by the picketers a captive in his own home. As the Supreme Court stated in Rowan:

"If [a] prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech, and other sound does not mean that we must be captives everywhere."

397 U.S. at 738.

Further, the Majority ignores the authority of a state or municipality to enact laws or ordinances for the protection of the public health and safety under its police powers. As the United States Supreme Court explained, that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; . . ." Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952).

"For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the

public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes."

Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

"The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted."

Carlson v. California, 310 U.S. 106, 113

(1940). Thus, I am convinced that the Framers of the Constitution would have held that the Town of Brookfield acted within its constitutional authority in enacting an appropriate content-neutral time, manner, place regulation of speech.

The analysis applied to determine the constitutionality of a challenged regulation of free expression depends on (1) the nature of the forum involved, and (2) whether the regulation is content-based. Where the forum involved falls within the class the Supreme Court has labeled "quintessential public

forums,"² the state may enforce a content-based regulation only by showing that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 46 (1983). However, the states may also enforce time, place, and manner regulations of expression that are content-neutral upon a lesser showing that the regulation is "narrowly tailored to serve a significant governmental interest" and that it "leave[s] open ample alternative channels of communication." Id. The first step in analyzing a statute or ordinance that regulates expression is to determine whether the regulation involved is a content-based or content-neutral time, manner, and place restriction.

The Brookfield ordinance challenged in this case provides:

² "Places which by long tradition or by government fiat have been devoted to assembly and debate." Perry, 460 U.S. at 45.

Section 9.17 Residential Picketing.

". . . (2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."

The ordinance is not selectively drafted and prohibits all picketing "before or about the residence or dwelling of any individual," regardless of the purpose of the picketing. The ordinance does not prescribe expression on the basis of the message contained in the expression, but rather proscribes a specific mode of expression (picketing), in a particular locality--a residential area. Therefore, the Brookfield ordinance is a content-neutral time, manner, and place regulation, and meets the test of constitutional validity if it serves a significant state interest, is narrowly tailored to meet that interest, and leaves open ample alternative channels of communication.

The Town of Brookfield set out in the declaration of purpose two interests among others that the picketing ordinance was

intended to serve: (1) protecting the privacy interests of its residents, and (2) the town's interest in protecting the safety of those using its streets and sidewalks by regulating vehicular and pedestrian traffic. The Supreme Court has long recognized the legitimacy of the state's interest in regulating expressive conduct that interferes with the orderly use of public streets:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. . . . Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."

Cox v. New Hampshire, 312 U.S. at 574 (emphasis added). See also Kunz v. New York, 340 U.S. 290, 293-94 (1951).

"The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction [e.g., a ban on picketing in residential areas] in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

Cox v. Louisiana, 379 U.S. at 554 (emphasis added). See also United States Labor Party v. Oremus, 619 F.2d 683, 688 (7th Cir. 1983) (Illinois statute which prohibited persons from standing on a "highway for purposes of soliciting employment, business or contributions from the occupant of any vehicle" is a

"permissible regulation"); ACORN v. City of Phoenix, 603 F. Supp. 869, 871 (D.C. Ariz. 1985) (holding unconstitutional an ordinance that prohibited "tagging" of cars on roadways because highway or roadway intersections "are not designated forums for public communication while in use by vehicular traffic") (emphasis added). The street in front of Dr. Victoria's home was intended for vehicular traffic and not as a forum for public communication. Although "highway" has a broad meaning (basically including any street, city or rural), the purposes of a highway, as used in the statutory definition, are limited. In defining highway, the statute refers to "every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads . . . opened to the use of the public for the purpose of vehicular travel." Wis. Stat. § 340.01(22) (emphasis added). Thus it is clear that the purpose envisioned by the Wisconsin legislature--vehicular travel--would be inherently incom-

patible with pedestrians' picketing, and the use of the street for picketing as a matter of right is lost. The record here reveals that there were no sidewalks along the streets affronting Dr. Victoria's residence and that the streets were but a mere thirty feet wide. Obviously any picketing conducted in front of private residences in Brookfield would be confined to those narrow streets where it obviously will disrupt and impede the purpose for which the land was dedicated--the free flow and movement of vehicular traffic. More importantly, the traffic on these roads poses a threat to the safety of pedestrians, including the picketers, especially young children, senior citizens and others who might be forced to walk further out onto the road in order that they might get around the picketers congregated, shouting and chanting in front of Dr. Victoria's residence. The danger to pedestrians on these narrow roads in front of and about Dr. Victoria's home becomes even greater when cars are parked on the streets,

as they were during the pickets involved here, leaving less space for the movement of traffic.³ The distraction of the driver's attention caused by the marching and chanting of the picketers and the narrowness of the streets certainly presented a safety hazard the Town of Brookfield is obligated to prevent. As we noted in Oremus where "the concern of the State is the evident dangers of physical injury and traffic disruption that are present when individuals stand in the center of busy streets trying to engage drivers and solicit contributions. . . .[t]his legislatively expressed concern outweighs" the solicitors' First Amendment interests. 619 F.2d at 688. The danger to picketers congregated in the street in front of Dr. Vic-

³ The record reveals that the picketers sometimes came to Dr. Victoria's home on buses which were parked on the street. Assuming the width of a bus is approximately seven feet, buses parked on both sides of the street would not only greatly effect the visibility of drivers and pedestrians, but would leave less than sixteen feet for traffic movement (and even less in the winter).

toria's home was no less than the danger to the solicitors in Oremus. This danger increases where, as in this case, the picketers do not limit their picketing to daytime, since at sunset visibility is reduced and thus driving is more difficult.⁴ The State of Wisconsin has recognized the danger to pedestrians using the streets and has imposed a duty on such persons: "No person shall stand or loiter on any roadway other than in a safety zone if such act interferes with the lawful movement of traffic." Wis. Stat. § 346.29(2) (Standing or loitering in highway prohibited). The Wisconsin Supreme court has stated:

"This court has, in a number of cases, held that a pedestrian, crossing a highway at other than a crosswalk, is, as a matter of law, at least 50 percent negligent in the event he is struck by a motor vehicle during the crossing. However, these cases cite and rely upon the right-of-way statute, imposing on a non-crosswalk pedestrian on a highway an

⁴ The record establishes that on several occasions, the picketing lasted until 8:30 p.m. In April the picketing was conducted after darkness had descended on the area.

absolute duty to yeild the right-of-way. . . . [Persons voluntarily on a street] are required to maintain a lookout and are negligent for placing themselves in such position of danger to their own safety. . . . [Playing on the street] adds an additional element [to the duty of care imposed on person walking across street]: using a highway for a purpose for which it was not intended, and placing oneself in a position of danger while so doing."

Wicker v. Hadler, 58 Wis. 2d 173, 179 (1972).

Wisconsin Statute § 941.03 makes it a felony to interfere with the orderly flow of traffic on a street:

"941.03 HIGHWAY OBSTRUCTION

(1) Whoever creates an unreasonable risk and high probability of causing death or great bodily harm to another by intentionally placing an obstacle in or upon a highway, damaging a highway, removing or tampering with a sign or signal used for the guidance of vehicles, giving a false traffic signal, or otherwise interfering with the orderly flow of traffic and realizes that he or she thereby created such risk and probability is guilty of a Class A felony."

(emphasis added). Highway is defined for purposes of the criminal code as:

"any public way or thoroughfare, including bridges thereon, any roadways commonly used for vehicular traffic, whether public or private, . . ."

The statute clearly covers all streets

including streets in residential neighborhoods, e.g., the street in front of Dr. Victoria's home. Thus, unless this court is prepared to hold § 941.03 of the Wisconsin Statutes unenforceable for being unconstitutional, I fail to understand how the Majority can hold the Brookfield picketing ordinance unconstitutional.

A number of picketers on a street pose a much greater danger than a person merely crossing the street. The continued presence of a picketer on a street designed and maintained exclusively for vehicular travel makes him a stationary target for any driver distracted by the picketing activity. If we allow picketing on streets and highways, the danger the picketers and pedestrians would be even greater during the winter months, when snowbanks along the streets protrude onto the streets making them even more narrow and thus providing even less space for the free movement of vehicular traffic, pedestrians. Picketing on streets would cause the Town a

myriad of problems. The Town would be subject to liability if it failed to adequately protect those using the streets from the increased hazards posed by the picketing activities. In order to adequately protect the pedestrians and the picketers, the Town at the expense of its taxpayers would in all probability be required to provide police protection to supervise and direct traffic and pedestrian flow around the area whenever any group decided to picket in a residential area. Since the picketers are not required to give notice of their plans to picket, the Town would have no way to plan efficiently for the staffing of officers needed to supervise the demonstration, and thus a demonstration could leave the town underprotected by tying up the on-duty police force. Furthermore, this would, in effect, place the Town of Brookfield and its residents in the position of subsidizing the protest activities of any group that selected a private residence as the target for a demonstration. Further, it is

inconceivable that the First Amendment requires taxpayers to bear the extra costs associated with unlawful picketing⁵ in private residential neighborhoods where they have ample and more appropriate alternative forums for advertising their grievances such as direct mail, radio, television, newspapers or telephoning as is common practice in political campaigns. As I discuss infra, there are reasonable and more appropriate places for the picketers here to conduct their protests--any area other than private residential neighborhoods or at the place where Dr. Victoria performs the surgical procedures.

Although protecting the privacy interests of its residents was one motivation for the Town's ordinance, the Majority disregards the other interest the Town set out in the declaration of policy, that of regulating traffic, simply because the town did not introduce evidence in this case that the abortion-

⁵ See Wis. Stat. § 340.01(22), supra at 44.

picketing had disrupted traffic. Picketing in the street obviously would disrupt the flow of traffic. The fact that there was no evidence of traffic disruption presented in this case does not negate the legitimacy or significance of the justification proffered for the ordinance. The ordinance bans all picketing "before or about the residence or dwelling of any individual," not just the picketing that the appellees seek to conduct. And thus the Majority unjustifiably assumes that because some picketing might not have implicated the Town's interest in protecting the safety of those using the streets, no picketing ever will. As this court noted in Oremus:

"Plaintiffs also argue that the [State] could serve [its] interest through a less restrictive means by punishing only those who actually disrupt traffic or engage in unsafe behavior. The state need not wait for personal injuries."

619 F.2d at 688 n.4 (emphasis added).

We do not require municipalities to wait until a building is engulfed in flames before allowing the city to enact and enforce fire codes. We do not require the deaths of

thousands in air traffic accidents before we regulate air travel. I fail to understand why the Town of Brookfield must wait until someone is injured, and seeks to recover damages from the Town or hold the Town liable, before it acts to protect those using its streets in an unlawful manner. See Wis. Stat. § 340.01(22).

Thus, I see no logical or legal basis to accept the Majority's assertion that the town's interest in regulating traffic in residential areas adds no weight to the town's justification for the ordinance. Picketing in a street interferes with the free movement of vehicular traffic and endangers citizens using the streets for lawful purposes (crossing the street at a crosswalk). Clearly, protecting the safety of its residents and others using its streets is a legitimate exercise of the Town's police power reserved to it by the Constitution.

"A restriction [e.g., a ban on picketing in residential areas] in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the

attempted exercise of some civil right which, in other circumstances, would be entitled to protection. Governmental authorities have the duty and responsibility to keep their streets open and available for movement."

Cox, 379 U.S. at 554.

Furthermore, it is a basic principle of tort law that a town that neglects to prevent foreseeable injuries in public areas can be held liable for its negligence. The examples of this are too obvious to recount. The danger to people using the streets lawfully while the picketers are demonstrating is so obvious that I do not comprehend how the Majority can cavalierly brush it aside stating that the Town's interest in regulating traffic "constituted only a minor part of the Town's interest in the ordinance." Majority op. at 22. When the interest in traffic regulation is combined with the Town's interest in protecting the privacy of its residents as set forth in the declaration of policy, the Town's justification for the ordinance is more than "significant," it is substantial and compelling.

The Supreme Court has previously acknowledged that in the privacy of the home, "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978). Indeed, almost 40 years ago, in 1949, the Supreme Court recognized the legitimate interest of the state in regulating expression so as to protect the privacy interest of its citizens in their homes. Kovacs v. Cooper (prohibition of sound trucks in residential neighborhoods). And in the years since the Kovacs decision, the Supreme Court has consistently held that where the privacy interest is substantial, the right to free expression may have to give way. As the Supreme Court pointed out in Graynard, when evaluating a time, manner, and place regulation "the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 118. Accordingly,

"consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 651-52 (1981).

See also Bering v. Share, 106 Wash. 2d 212, 721 P.2d 918 (1986). Indeed, the Town of Brookfield determined--and I agree with its well-reasoned conclusion--that picketing was incompatible with the normal activity of a private residential neighborhood.

"The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

Graynard, 408 U.S. at 118.

Unless this court can hold as a matter of law that picketing is compatible with the normal activity usually carried on in a residential neighborhood, it is not the function of this court or any other court to substitute its judgment for the careful and considered judgment of the Brookfield Town Council. Clark v. CCNV, 104 S. Ct. 3065, 3072 (1984).

"We do not believe, however, that either United States v. O'Brien, or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the nation's parks. . . ."

(emphasis added). To do so is to ignore the municipality's own right of governance. In order to fit its analysis into the Perry test for time, manner, and place regulations the Majority is forced to assert both that picketing is compatible with the normal activities of a residential neighborhood and that ample alternative channels are not available to the picketers because "the disturbance occasioned by the residential picketing in this case is actually one measure of its unique value. . . ." Majority op. at 18. The Majority ignores the incompatibility of picketing with a residential area and ingeniously states:

"The fact that the message may reach and disturb families and children is clearly part of the point of the picketing, for, to a certain extent, the picketers seek to communicate their concerns about a perceived assault on the family and on childhood itself. There can be no better place to convey those concerns than in a residential area."

Majority op. at 18. The Majority incorrectly assumes that prohibiting the picketers from demonstrating in front of Dr. Victoria's home denies the picketers access to his neighbors. But this is totally unfounded because nothing in the ordinance precludes the picketers from reaching Dr. Victoria's neighbors through use of advertising through the media of direct mail, radio, television, newspaper or telephone. Each of these alternative methods allows Dr. Victoria's neighbors to "turn off" the message and protect their privacy should they choose to do so, and thus is in accord with the safeguards of privacy enumerated in the decisions of the United States Supreme Court. See Pacifica; Rowan; Kovacs. See also, 39 U.S.C. § 4009 (Prohibition of pandering advertisements in the mails).

Furthermore, contrary to the Majority's assertion, I fail to see any connection between the picketers' message that abortion is wrong that would make anti-abortion picketing compatible with the neighborhood wherein a

doctor who performs abortions happens to reside. There is no evidence in the record that Dr. Victoria performed abortions at his home or provided any abortion-related service in his home, much less ever received phone calls concerning his abortion practice since his home phone is unlisted. Whom did the picketers intend the message to reach? If they intended to dissuade others from obtaining abortions by advertising the same through picketing, they were in the wrong place for their activity would have more impact at one of the clinics in the immediate area where those intending to receive an abortion would visit to have the vacuum or surgical procedure performed and where the pedestrian and vehicular traffic is much greater. If it was their intention to persuade Dr. Victoria's neighbors that abortion was wrong, as the Majority suggests, the ordinance does not prevent their access to his neighbors since direct mail, radio, television, newspapers, and telephones all provide the picketers with the same access

to Dr. Victoria's neighbors that any political campaign has. If they intended to embarrass, harass and intimidate the doctor and embarrass him by annoying his neighbors, then certainly the right of free expression in this case does not counterbalance the well-recognized right of an individual to the privacy of his own home, "sometimes the last citadel of the tired, the weary, and the sick." Gregory, 394 U.S. at 125. (Black, J., concurring). I do not agree with the Majority's holding that in effect interprets the First Amendment to include the right to harass or intimidate others.

Another major flaw in the Majority's analysis of the compatibility issue is that the Majority conveniently avoids addressing the central question. The central question is not, as the Majority seems to believe, whether the message the picketers seek to convey is compatible with the residential area the ordinance covers, but rather, as the Supreme Court enunciated, whether "the manner of

expression" is basically incompatible with "the normal activity of a particular place at a particular time." Graynard, 408 U.S. at 118 (emphasis added). The Majority admits that the conduct of the picketers in front of private residences disrupts the neighborhood wherein it occurs. As the United States Supreme Court decisions make clear, an individual's residence, and the neighborhood surrounding that residence, is a place for quiet repose; family tranquility; an "island of solace" away from the "hustle and bustle" of public activity. See Pacifica, Kovacs, Rowan. Cf. Cohen v. California, 403 U.S. 15, 21 (1971) ("... this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which can never be considered as being totally banned from the public dialog . . ."). In Kovacs, the Court stated:

"The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their atten-

tion. This is the phase of freedom of speech that is involved here. We do not think the Trenton ordinance abridges that freedom. It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. Surely such an ordinance does not violate our people's 'concept of ordered liberty' so as to require federal intervention to protect a citizen from the actions of his own local government. Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers."

336 U.S. at 88-89 (emphasis added). The presence of picketers lurking outside one's home, threatening the very peace and tran-

quility and security that constitutes a most significant part of the right to privacy, can never be considered as being compatible with the normal activities of a private residential neighborhood. See Pacifica; Rowan. The frightening of small children, as occurred during the prior demonstrations in front of Dr. Victoria's home by these picketers, can never be accepted much less tolerated as part of the normal activity that occurs in a residential neighborhood.⁶ Despite the

⁶ During the April 20, 1985 picketing of Dr. Victoria's home, one of the picketers told a five-year old neighbor boy that "there is a man up the road who kills babies." The child became upset and would not leave the house the rest of the day. For over one week, the child would not even visit his little friend's house because his friend lived two houses away from the "man who kills babies." Another neighbor of Dr. Victoria related that while walking in the area where the picketing occurred with his six-year old daughter, picketers approached and made comments, in the presence of the child, to the effect that Dr. Victoria was killing their children. I am at a loss to understand how the Majority can condone such conduct--as it clearly does by stating that "the disturbance [of families and children] occasioned by the residential picketing in this case is actually one measure of its unique value. . . ." Majority op. at 18.

obvious incompatibility of the picketing with the residential areas of the Town of Brookfield, the Majority cavalierly concludes that the Town's interest in protecting its residents from the "noisy, marching, tramping picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown," Cox, 394 U.S. at 126 (Black, J., concurring), can never be sufficient to justify the limited restraint on free expression imposed by the Brookfield ordinance.

Clearly the Framers of the Constitution never intended the right of free speech as a weapon of harassment or intimidation of individuals in the very privacy of their own dwellings. Thus, the Town of Brookfield's picketing ordinance was justified by compelling state interests: protecting the right of privacy of residents in their own homes and regulating vehicular and pedestrian traffic on narrow streets without sidewalks.

Having enacted the ordinance to serve

substantial and compelling interests, the Town of Brookfield is entitled to enforce the ordinance as long as it is "narrowly tailored" to serve those interests and as long as "ample alternative channels of communication" are made available to picketers. Since the ordinance is narrowly tailored and circumscribed and ample alternatives remain for the picketers to convey their message, I would hold the ordinance constitutional under the Perry criteria.

Contrary to the assertion of the Majority that in order for the town to establish that its ordinance is "narrowly tailored," it must "demonstrate that its objectives will not be served by means less restrictive of First Amendment freedoms," Majority opinion at 20-21, the town need only establish that its content-neutral regulation of expression "responds precisely to the substantive problems which legitimately concern the [town]." City Council v. Taxpayers for Vincent, 104 S. Ct. 2118, 2132 (1984). The Majority derives

its "less restrictive" alternative requirement from this court's ingenious interpretation of the Perry time, manner, and place test in City of Watseka v. Illinois Public Action Council, No. 84-2605 (7th Cir. July 18, 1986). In Witseka, the Majority incorrectly read into the "narrowly tailored" prong of the Perry test a requirement that the government, when arguing the constitutional validity of a statute or ordinance that impinges on free expression, must establish that "less restrictive alternatives are inadequate to protect the governmental interest." Slip op. at 12. The Majority somehow condescendingly cast aside my argument that cases decided after Perry made clear that the "less restrictive" alternative requirement was not part of the test for content-neutral time, manner, and place regulations. See Witseka, Slip op. at 27-39 (Coffey, J., dissenting). In Clark v. CCNV, the Supreme Court emphatically rejected the "less restrictive" alternative that the District of Columbia Circuit had read into the

content-neutral time, manner, and place test:

"We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, as there are less speech-restrictive alternatives that could have satisfied the government's interest in preserving park lands. There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park Mall. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either United States v. O'Brien, or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."

104 S. Ct. at 3072 (emphasis added).

Despite this unequivocal rejection of the "less restrictive alternative" requirement, the Majority in Watseka insisted on reading the requirement into the Perry test explaining:

We do not believe that Justice White's opinion in Clark rejected the less restrictive means analysis. See 52 U.S.L.W. at 4989. Although the opinion rejects the lower court's less-restrictive means holding, we read Justice White to say that the alternatives were not adequate. Although Justice White has elsewhere expressed his disapproval of the less-restrictive-means standard, see Regan v. Time, 52 U.S.L.W. at 5089, that view has never attracted a majority of the Court. See also Kenosha, 767 F.2d at 1255 n.4"

Slip op. at 12 n.13. The Supreme Court cases decided after Clark make it even more clear, definite and certain that the "less restrictive" alternative requirement is not part of the time, manner, and place test. In United States v. Albertini, 105 S. Ct. 2897, 2907 (1985) (emphasis added), the Court stated:

"[T]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. See Clark v. Community for Creative Non-Violence, 468 U.S. _____, 104 S.Ct. 3065, 3070, 82 L.Ed2d 221 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"). Regulations that burden speech incidentally or control the time, place, and manner of expression, see id., at _____, and n.8, 104 S.Ct., at 3071, and n.8, must be evaluated in terms of their general

effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. Id. at _____, 104 S.Ct., at 3072. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Cf. id., at _____, 104 S.Ct., at 3071 ("if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment.") The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests. Id., at _____, 104 S.Ct., at 3072."

In City of Renton v. Playtime Theaters, Inc., 106 S.Ct. 925, 928 (1986) (emphasis added), the Court explained:

"On the other hand, so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, _____, 104 S.Ct. 3065, _____, 82 L.Ed.2d 221 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789, 807, 104 S.Ct. 2118, _____, 80 L.Ed.2d 772 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, 648, 101 S.Ct. 2559, 2563, 2564, 69 L.Ed.2d 298 (1981)."

This measure of constitutional validity is not an inflexible standard. In Clark v. CCNV, 104 S.Ct. 3065, 3071 (1984), the Supreme Court held that the fact that a more carefully drafted regulation banning sleeping in parks in the District of Columbia could have accomplished the purposes of the Park's Services "more effectively or less clumsily" than the regulation enacted, did not make the regulation constitutionally infirm. Thus, even though the protection of the government's interest involved in Clark was "imperfect," the absence of perfection did not negate the value of the regulation in achieving the government's purpose.

These cases make it clear that the "less restrictive" alternative requirement is not part of the time, manner, and place test where the regulation involved is content-neutral. I fail to understand how the Majority can defiantly persist in reading that gratuitous requirement into the test in view of the clearly expressed directives from the Supreme

Court of the Land that the government need not establish that a content-neutral regulation of expression is the least restrictive means to accomplish a legitimate government objective.

Thus, if the interest of the particular governing body, state or municipality in enacting laws or ordinances which limits expression is significant, the regulation is constitutionally valid if it effectuates that interest even imperfectly, and our courts should not second guess the legislatures as to the efficiency or adequacy of the means ultimately chosen by the state:

" . . . 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."

Renton, 106 S. Ct. at 928.

The Majority, in striking down the Brookfield ordinance because, in its view, there are less restrictive alternatives "available to the town to address its legitimate concerns" not only imposes and mandates a burden on the town greater than that required by the Supreme

Court, but substitutes its own judgment as to how best to protect the privacy interests of Dr. Victoria and his innocent neighbors and citizens for that of the Brookfield Town Council. "The validity of such regulations does not touch on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." Albertini, 105 S. Ct. 2907. It is not the function of this court to second-guess the legislative bodies of states in enacting statutes and ordinances, since they are more attuned to the problems of their locale and thus are in a far better position to make this determination than is this court.

Finally, the Majority incorrectly concludes that a ban on picketing in residential areas is unconstitutional because it does not provide ample alternative channels of communication. The Majority claims that forcing these picketers "to picket in non-residential areas would be, in effect, to force them to engage in an entirely different form of

expressive activity." Majority opinion at 18. This over-narrow reading of the ample alternative prong of the time, manner, and place test contravenes the very concept of time, manner, and place restrictions on free expression. The concept of time, manner and place regulations of free speech recognizes that not every form of speech is compatible with the location where the speaker may want to convey his message. The issue in analyzing the constitutionality of a content-neutral time, manner and place regulation is whether the regulation denies the speaker access to listeners that but for the ordinance could be reached by the speaker. But there is

"no restriction upon the communication of ideas of discussion or issues by the human voice, by newspapers, by pamphlets, by dodgers."

Kovacs, 336 U.S. at 89.

The Brookfield ordinance does not deny the picketers access to Dr. Victoria's neighbors through alternative means of communication (direct mail, radio, television, newspapers

and telephones); rather it merely provides his neighbors the opportunity to turn off the picketer's message and enjoy the privacy of their own homes. The Majority has taken it upon itself to rewrite the decisions of the United States Supreme Court on time, manner and place exception to the First Amendment to include a right to make unwilling listeners captives in their own homes. This is contrary to case law and logic and effectively undermines any attempt by the state or municipality to regulate any form of expressive conduct.⁷

The Majority does not stop at rewriting the exception for time, manner, and place restrictions. It goes on to speculate that the "quality of the means of expression" used by the picketers would be adversely affected by the ordinance because "consigned to the 'safe' and busy area around Bluemound Rd., they may be conveniently ignored by passersby.

⁷ See Taxpayers for Vincent. Indeed, none of the regulations upheld by the Supreme Court would be constitutionally valid under this approach.

They may be written off as excentric and irrelevant nuisances." I am at a loss to understand how anyone can "conveniently ignore" 30-40 people parading up and down a sidewalk chanting and carrying placards. Even so, the Majority concludes that because residential picketing does not permit "the citizens to ignore or trivialize the message picketers wish to communicate," the town cannot prohibit picketing on residential streets. In other words, the Majority has determined that the residents of Brookfield, Wisconsin, and every other suburban or residential area must listen to the message of picketers and each and every other group that decides to communicate its message by lurking about the private homes of those residents infringing upon the use and enjoyment of their homes. Brookfield's residents, contrary to the Supreme Court's statement that "no one has a right to press even good ideas on an unwilling recipient," are made captives in their own homes. Rowan, 397 U.S. at 738. Any group or

organization can now make people captive in their own homes in any residential neighborhood. In so doing, the Majority has demonstrated a complete disregard for the absence of any alternatives to Dr. Victoria and his neighbors to protect their right of privacy. It is Dr. Victoria, his neighbors and their infant children who do not have an adequate (equivalent quality) alternative for the exercise of their constitutional right to privacy in their own home; the picketers have several alternative methods that would effectively allow them to communicate their message without infringing on the constitutional rights of others. The ordinance does not preclude the picketers from conveying their message. The picketers should limit their picketing activity to the clinics where Dr. Victoria performs abortions or any areas other than those zoned residential.⁸ The Majority

⁸ The fact that picketing the abortion clinics might interfere with other activities of the anti-abortion group responsible for the picketing (e.g., disrupt sidewalk counseling)

concludes, however, that because people are free to ignore the picketers in the alternative forums available, such forums do not provide an adequate alternative to the residential streets covered by the Brookfield ordinance. "Forcing [the picketers] to picket in non-residential areas would be, in effect, to force them to engage in an entirely different form of expressive activity." Majority opinion at 18. There is no support in the Constitution for the Majority's position which forces unwilling listeners to give up their right of privacy in their dwellings and become the captive audience of any group or organization with a message to communicate.

I fail to understand how the Majority can speculate simply on the basis of the fact that

does not entitle the picketers to violate the privacy rights of Dr. Victoria and his neighbors. It is the anti-abortion group itself that has foreclosed this alternative means of communicating its message, not the Town of Brookfield. The Majority forces the residents of Brookfield to endure invasions of the residents' privacy merely because the anti-abortion group has chosen conflicting methods to communicate its message.

people may be able to ignore the picketers in non-residential areas that the Brookfield ordinance failed to provide ample alternative channels of communication through which the picketers can convey their message. If we stretch the limits of the First Amendment, as the Majority has, to provide the picketers with the right to picket Dr. Victoria's house, do they also have the right to follow Dr. Victoria around, posting picketers outside of every place he enters to embarrass Dr. Victoria, his family, his friends: Outside his church or synagogue so as to interfere with other worshipers? Outside his relatives' homes? Outside the homes of his friends? Outside his children's school? The Majority's holding expands the rights of the picketers at the expense of the rights of the majority of Brookfield's residents that are reflected in its passage of this ordinance. The Majority assumes, contrary to the explicit mandate of the United States Supreme Court, that the right to free speech includes the right to

force unwilling people to listen. See Cox v. Louisiana; Rowan v. United States Post Office Dept. The Majority's contention undermines the required balancing of conflicting constitutional rights that the Supreme Court has required in cases such as this where the exercise of free speech interferes with the exercise of another constitutional right by others. See Cantwell. The disregarding of countervailing constitutional rights is especially intolerable where the right of privacy is involved. For the first time in almost 200 years since the drafting of our Constitution, the Majority has decided that the right of free speech is always more important than any other individual right guaranteed by the Constitution in direct contradiction to what the Supreme Court stated in Pacifica: in the privacy of the home, "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. Thus, the Majority erroneously, as pointed out earlier,

concludes that no ample alternative to residential picketing exists through which the picketers in this case can communicate their message since in no other available forum could the picketers force their message on an unwilling captive audience. I cannot agree with the Majority's unwarranted expansion of the First Amendment right of free speech to include the privilege of forcing others to receive any message that a group, organization, or individual desires to communicate.

Furthermore, the Majority fails to recognize that ample alternative methods of communicating the picketers' message in residential areas of Brookfield exist. The picketers could direct mail literature to each of Dr. Victoria's neighbors stating their views on abortion and informing Victoria's neighbors of the doctor's activities. The picketers could advertise on the radio or on television, in newspapers or by using the telephone and communicate their views through those media. If the picketers need to demon-

strate in Brookfield, let it be in the commercial areas of the Town, where their message could reach more people with less infringement on the rights of others. Each of these alternatives allows as the Supreme Court requires, the listener the freedom to turn off the message at any time; each allows the listener to protect his own privacy and does not allow protesters to make captives of unwilling listeners. Thus, contrary to the assertion of the Majority, ample alternatives exist through which the picketers can communicate their message of dissent as effectively as they can by picketing Dr. Victoria's private home and which do not infringe upon the rights of privacy of others in their homes and completely foreign to the controversy. The Majority ignores the rights of others to disregard messages they choose not to hear. See Rowan.

Therefore, because the Majority has unreasonably expanded the right of free expression beyond the limits established by

the Supreme Court, and has done so at the expense of an equally valuable and important right, the right of privacy in one's own home, I dissent. The residents of the Town of Brookfield through their Town Council have a right to decide what they will or will not hear. The Supreme Court explained:

"Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."

Cox, 312 U.S. at 574 (emphasis added). The Town of Brookfield was entitled to exercise its police power to protect the comfort and convenience of its residents:

"The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."

Kovacs, 336 U.S. at 83.

The Majority in its opinion has underwritten the right of any group or organization to disrupt tranquility and privacy that we have come to associate with our homes.

"To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."

Kovacs, 336 U.S. at 88.

As the Supreme Court of Wisconsin noted over 15 years ago:

"To those inside . . . the house becomes something less than a home when and while the picketing . . . continue[s] with [T]he tensions and pressures may be psychological, not physical, but they are not for that reason less inimical to family privacy and truly domestic tranquillity."

Wauwatosa v. King, 49 Wis. 2d 398, 411-12, 182 N.W.2d 530, 537 (1971) (quoted by Rehnquist, J., dissenting in Carey v. Brown, 447 U.S. at 478).

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No. 87-168

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

CLERK

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court
of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether this Court has appellate jurisdiction over a case in which the district court granted a preliminary injunction and would have granted a permanent injunction had there been no appeal or trial, and the appellate court affirmed the district court and remanded the case.

2. Whether § 9.17 of the Town of Brookfield General Code, which prohibits picketing in residential areas in order to preserve safety and privacy, is a reasonable regulation of speech in a nonpublic forum.

3. In the alternative, whether the ordinance is a constitutional time, place, and manner regulation of speech in a full public forum.

PARTIES

Other defendants below and appellants in this Court are George H. Hunt, Robert Wagowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield.

The other plaintiff below and appellee in this Court is Robert L. Braun.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-168

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court
of Appeals for the Seventh Circuit

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Wisconsin, granting the motion of appellees (hereinafter "the picketers") for a preliminary injunction is reported as Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985) (Jurisdictional Statement at A-3. Appellants (hereinafter "the Town") appealed, and a panel of the U.S. Court of

Appeals for the Seventh Circuit affirmed. Schultz v. Frisby, 807 F.2d 1339 (7th Cir. 1986) (JA-147). The court of appeals vacated the panel decision and granted a rehearing en banc. Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987) (Jurisdictional Statement at A-2). The Seventh Circuit, sitting en banc, then affirmed the judgment of the district court, by an equally divided court and without a published opinion. Schultz v. Frisby, 818 F.2d 33 (7th Cir. 1987) (Jurisdictional Statement at A-1).

JURISDICTION

This is an appeal from a judgment order of the Seventh Circuit Court of Appeals dated April 30, 1987, that affirmed the judgment of the District Court for the Eastern District of Wisconsin and remanded the case to that court. Jurisdiction in the court of appeals was based on 28 U.S.C. § 1292(a)(1). The district court order was filed on October 7, 1985. Jurisdiction in that court was based on 28 U.S.C. § 1343. The district court granted a

preliminary injunction enjoining appellants from enforcing an ordinance of the Town of Brookfield because the ordinance was likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum (Jurisdictional Statement at A-22). A panel of the appellate court originally heard the case and issued an opinion reported at 807 F.2d 1339 (7th Cir. 1986) (JA-85). The court then vacated that opinion and granted a rehearing en banc. Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987) (Jurisdictional Statement at A-2). After rehearing, an evenly divided court affirmed the district court order without opinion (Jurisdictional Statement at A-1).

A notice of appeal to this Court (Jurisdictional Statement at A-24) was filed on July 16, 1987 with the clerk of the Seventh Circuit Court of Appeals and the clerk of the District Court for the Eastern District of Wisconsin. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2), because the

district court found the ordinance was likely to be found unconstitutional. A municipal ordinance is considered a state statute for the purposes of 28 U.S.C. § 1254(2). City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976). On January 11, 1988, this Court ordered that further consideration of the question of jurisdiction would be postponed to the hearing of the case on the merits.

STANDARD OF REVIEW

In this case virtually all of the facts were undisputed (see JA-16 to JA-17), thus the district court's decision was based on points of law. Because the district court's errors of law are the subject of this appeal, plenary review by this Court is appropriate. See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 2177 (1986).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

The first amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . .
abridging the freedom of speech . . .

U.S. Const. amend. I.

The fourteenth amendment to the United States Constitution provides in pertinent part:

. . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 9.17, General Code, Ordinances of Town of Brookfield provides in pertinent part:

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

Town of Brookfield, Wis., General Code, Ordinances § 9.17 (1985). The entire text of the ordinance is set forth at page A-26 of the Jurisdictional Statement.

STATEMENT OF THE CASE

Between April 20 and May 20, 1985, appellees Sandra Schultz and Robert Braun, together with groups of other antiabortion

demonstrators, picketed the home of Dr. Benjamin Victoria (Jurisdictional Statement at A-5 to A-6). Dr. Victoria apparently performs abortions as part of his medical practice in the cities of Appleton and Milwaukee (Jurisdictional Statement at A-6). The groups of picketers ranged in size from eleven to more than forty persons, and they picketed on at least six different occasions during the one-month period (Jurisdictional Statement at A-6).

Dr. Victoria's home, at 750 North Briar-ridge Drive, is in the Black Forest Subdivision of the Town of Brookfield, Wisconsin. The zoning in the subdivision is exclusively single family residential (Jurisdictional Statement at A-6). All of the residential streets in Brookfield are approximately thirty feet wide, sufficient for one vehicle in each direction; there are no sidewalks (Jurisdictional Statement at A-6).

The Town of Brookfield is a residential suburb of the City of Milwaukee. It has a

population of approximately 4,300 people, and an area of 5-1/2 square miles (Jurisdictional Statement at A-6). Considerable business and commercial development is clustered along West Bluemound Road (State Highway 18); the remainder of the Town is residential (JA-49).

The picketing spawned numerous complaints and reports to the town's police department. Residents of the neighborhood told police that their children had been frightened by picketers' statements that there was "a man up the road who kills babies"; that they found the picketing an annoying disturbance and a public nuisance; and that they worried that real estate values and sales would be affected (JA-50 to JA-52). Dr. Victoria's family reported that the pickets had trespassed on their property in order to tie red ribbons on the house and shrubbery, and that their car had been blocked from entering the driveway (JA-51 to JA-52).

On May 7, 1985, the Brookfield Town Board enacted an ordinance that prohibited all

picketing in residential areas except labor picketing. The ordinance never was enforced because appellant Town Attorney Clayton Cramer determined that it was probably unconstitutional under Carey v. Brown, 447 U.S. 455 (1980). The Town Board repealed the ordinance and passed, on May 15, 1985, a substitute ordinance that declared simply, "[i]t is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., General Code, Ordinance § 9.17 (1985) (Jurisdictional Statement at A-28). Appellees have refrained from picketing since the effective date of the ordinance, May 21, 1985 (Jurisdictional Statement at A-10).

Pickers Schultz and Braun filed a complaint under 42 U.S.C. § 1983, seeking declaratory and preliminary and permanent injunctive relief from an alleged deprivation of their rights under the first and fourteenth amendments of the United States Constitution

(JA-1). The district court heard the picketers' motion for a preliminary injunction on August 13, 1985. The Town argued in its brief that the ordinance is content-neutral and was enacted to promote the Town's interests in preserving the tranquility and privacy of the home and neighborhood, as well as public safety. The district court granted a preliminary injunction on October 7, 1985 (Jurisdictional Statement at A-22). The court held that the ordinance was likely to fail the test of a constitutional time, place and manner regulation of speech in a public forum (Jurisdictional Statement at A-23). The court's order provided that the preliminary injunction would become a permanent injunction if the Town did not appeal and if neither party requested a trial within sixty days (Jurisdictional Statement at A-23).

The Town appealed to the Seventh Circuit Court of Appeals, and argued in its brief that the ordinance does not violate the first and fourteenth amendments of the Constitution

because it is a content-neutral, time, place and manner regulation; it is narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels of communication. A panel of the court of appeals heard the case on April 9, 1986, and affirmed the district court, with Judge Coffey dissenting (JA-85). The court of appeals then granted appellants' motion for rehearing, and the full court heard the case on April 29, 1987. The decision and order of the court of appeals affirmed the district court order by an evenly divided court without opinion, and remanded the case for any further proceedings deemed necessary (Jurisdictional Statement at A-1).

SUMMARY OF ARGUMENT

The district court in this case granted the picketers a preliminary injunction that enjoined the enforcement of Brookfield's residential picketing ordinance. The court considered facts presented by the parties by way of proposed statements of fact and

affidavits; the parties disputed only the details of the picketers' behavior. The court granted a preliminary injunction, but, based on the evidence before it, would have granted a permanent injunction had the Town not appealed and asked for a trial. The court of appeals affirmed the district court, and remanded the case for "any further proceedings deemed necessary." Under these circumstances, this court has appellate jurisdiction because the judgment of the district court, in effect, was final, and no purpose would be served in returning the case to that court for trial.

Brookfield's picketing ordinance affects one type of expressive behavior that has occurred on its narrow residential streets. Streets such as these, only thirty feet wide with no sidewalks, have not traditionally, or by government designation, been used for picketing. Therefore, they are a "nonpublic forum," and the constitutionality of the ordinance should be evaluated using the

appropriate standard. That standard requires that the ordinance be reasonable and not an effort to suppress expression just because the public officials oppose the speakers' views. Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985). Brookfield's ordinance is reasonable and was not enacted in order to suppress the picketers' particular viewpoint.

In the event that the Court views Brookfield's residential streets as a traditional, full public forum rather than a nonpublic forum, the ordinance also meets the requirements of a constitutional time, place, and manner regulation of speech. These requirements are that the ordinance be content neutral, promote significant governmental interests, be narrowly tailored, and leave open ample alternative channels of communication. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The ordinance disallows groups with all points of view from picketing in

residential areas, and so is content neutral.

Cf. Carey v. Brown, 447 U.S. 455 (1980).

Brookfield's purpose in enacting the ordinance was to protect the safety and privacy of its residents. Because the residential streets of Brookfield are narrow and without sidewalks, picketers walking or standing on them pose a danger to themselves and others. Picketers also disturb the privacy of Brookfield residents in their homes. These safety and privacy concerns are significant governmental interests that are promoted by the ordinance.

The residential picketing ordinance is narrowly drawn to restrict only the activity that would cause safety problems and invasion of privacy. Only picketing is restricted, and only in residential areas. An ordinance that was more limited, for example that restricted picketing by time of day or season, could be unconstitutional, see City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___U.S.____, 107 S. Ct.

919 (1987), and would not adequately advance Brookfield's legitimate interests.

Protesters in Brookfield are allowed to protest in many ways other than picketing in residential areas. They may distribute literature, make phone calls or enter the neighborhood alone or in groups. In addition, protesters may engage in all peaceful forms of protest, including picketing, in the commercial areas of the Town. Ample alternative channels of communication therefore exist.

Finally, the ordinance is not overbroad. It is not susceptible to an overbreadth challenge because there is no realistic danger that it will significantly compromise the free speech rights of parties not before the Court. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984). Other methods of expression are available in residential areas, and all peaceful methods of expression may be carried out in commercial areas of the Town.

In addition to the arguments contained herein, the Town adopts by reference the dissenting opinion of Judge Coffey to the withdrawn Seventh Circuit panel decision (see JA-148 to JA-207).

ARGUMENT

- I. Because the District Court Made a Final Decision on the Constitutionality of Brookfield's Residential Picketing Ordinance, and the Court of Appeals Affirmed, this Court has Appellate Jurisdiction.

Appellants respectfully submit that the court has appellate jurisdiction in this case under 28 U.S.C. § 1254(2). The judgment of the lower court must be final in order for this Court to have appellate jurisdiction. Slaker v. O'Connor, 278 U.S. 188, 189-90 (1929); McLish v. Roff, 141 U.S. 661, 665-66 (1891). The Court in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169 (1986), recently put to rest questions about the validity of this rule in the situation "where a case is remanded for further development of the facts." 106 S. Ct. at 2176. In that case the district court ordered the parties to submit a stipulation of uncontested facts, which was used solely to determine the plaintiffs' motion for a preliminary injunction, "without

prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding . . ." in the action. 106 S. Ct. at 2174. The district court concluded that, with one exception, the plaintiffs had failed to establish a likelihood of success on the merits, and so were not entitled to a preliminary injunction. Id. On appeal, the court ruled that various portions of the state statute at issue were unconstitutional, and that the validity of other provisions might depend on evidence adduced at trial or on procedural rules to be promulgated by the state supreme court. The court remanded these portions of the case to the district court. 106 S. Ct. at 2175. Under these circumstances, this Court held it had no appellate jurisdiction under § 1254(2), 106 S. Ct. at 2176.

The situation in the case at bar is significantly different than that in Thornburgh. The district court did not require a stipulation of uncontested facts, but

considered facts from each party. Specifically, the district court considered the facts contained in plaintiffs' proposed statement of the facts; defendant's proposed statement of the facts; the Town of Brookfield residential picketing ordinance; various other Town of Brookfield ordinances concerning obstructing streets and sidewalks, unnecessary noise, destruction of property, littering, criminal trespass, and disorderly conduct; a plat map of the subdivision where the picketing occurred; a story and accompanying photograph from the May 21, 1985, edition of the Milwaukee Sentinel; and fifteen affidavits that make up part of the Joint Appendix (Jurisdictional Statement at A-4, A-5, A-9; see Ja-18 to JA-84). The only disputed facts concerned the details of the picketers' behavior; the fact of their picketing was not disputed, and neither party believed an evidentiary hearing was necessary (see JA-16 to JA-17). In addition, the court considered the arguments of counsel (Jurisdictional

Statement at A-5). The court was fully informed, and would have granted plaintiffs a permanent injunction without hearing additional evidence, had defendants not appealed and requested a trial (Jurisdictional Statement at A-22, A-23).

Defendants did appeal, and the Seventh Circuit Court of Appeals, without opinion, affirmed the district court's judgment and returned the case to the district court "for any further proceedings deemed necessary" (Jurisdictional Statement at A-1). Because the district court was willing to enter a permanent injunction based on the evidence presented at the hearing, it is unlikely that "further proceedings" would be "deemed necessary" by that court.

This case is one in which the Court may find that the finality requirement is satisfied in light of the facts. See Thornburgh, 476 U.S. at ___, 106 S. Ct. at 2175. In City of New Orleans v. Dukes, 427 U.S. 297 (1976),

the court of appeals reversed the district court, and held an ordinance unconstitutional as applied and remanded the case to the district court to determine the severability of a clause of the ordinance. Id. at 301. This Court nevertheless held that the finality requirement was met under the facts of the case. Id. at 302. The constitutional issues were fully adjudicated in the court of appeals and only a state law question remained to be determined on remand. Id. The Court stated that the policy underlying § 1254(2), which is to ensure that state laws are not erroneously invalidated, would not be served by further delay in deciding the constitutional issue. Id. Thus this Court held it had appellate jurisdiction in the case. Id. at 303.

The case at bar likewise should be considered final, despite the remand order. No purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction. That court already had determined it would grant a

permanent injunction, based on the evidence before it, and a trial would merely delay the determination of important constitutional issues. Appellants therefore submit that the decision appealed from is final and that this Court has appellate jurisdiction under 28 U.S.C. § 1254(2).

In the event the Court does not find appellate jurisdiction, appellants respectfully request the Court to treat the Jurisdictional Statement as a petition for writ of certiorari, and grant certiorari under 28 U.S.C. § 2103.

II. The Narrow Residential Streets of the Town of Brookfield are a Nonpublic Forum, and the Residential Picketing Ordinance is a Reasonable Regulation of Speech.

The district court assumed that the residential streets of the Town constituted a traditional, full, public forum. That assumption is based upon the frequently stated, but never examined conclusion that "streets . . . 'have immemorially been held in trust for the use of the public, and, time out of mind, have

been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Haque v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939); quoted in Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Town submits, with all due respect, that the question of whether its residential streets are a full public forum is not sufficiently addressed by this statement.

It is submitted that the question of the actual forum status of a given residential street or cul-de-sac has never been precisely presented to this Court. That argument is now advanced. Perry acknowledged that the very existence of the "right to access to public property, and the standard by which limitations on such right must be evaluated, differs depending on the character of the property at issue." Id. at 44. Brookfield submits that its residential streets are not traditional or dedicated, full, public fora for all forms of expression.

The district court applied the 'full-forum' test, mentioned in Perry and discussed infra, to the ordinance. Perry also noted an alternative status of a nonpublic forum, however; "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." Id. at 46. It has never even been established in this case that the residential streets in question are owned by the government. Moreover, this Court has:

recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Perry, 460 U.S. at 46 (citations omitted).

The residential streets in question have never been held open, by tradition or designation, to all members of the general public to congregate upon, regardless of their own place

of residence and lack of business or social purpose for being there. Hence, the inquiry must turn to whether such strangers are allowed to enter and remain for the precise purpose of picketing. In this regard, it is observed that the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum. Perry, 460 U.S. at 49, n.9.

In Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985), this Court viewed the relevant forum as a charity drive, rather than the governmental premises upon which it was held. Id. at 801. The principle thus appears to be that the relevant forum involves participation in a certain activity rather than merely the place in which it transpires. This explains the basis for the forum analysis in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984). The court there examined whether a particular form of expression is

inappropriate for, or incompatible with, the character of the property and its intended use. Id. at 773. Thus, in that case it was held that public areas in a commuter train station did not constitute a public forum. Id. Likewise, in Trenouth v. United States, 764 F.2d 1305 (9th Cir. 1985), the court held a truck parking area not to be a public forum. Id. at 1309.

As this 'activity' analysis has been applied most analogously to date, Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984), held that door-to-door canvassing of private homes is plainly not a public forum. Id. at 187. "Indeed, the Supreme Court has noted that, because of the countervailing privacy interests of householders, [o]f all the methods of spreading unpopular ideas, house to house canvassing seems the least entitled to extensive protection." Id. at 186 (citations omitted). Because of identical privacy interests of householders here, and of their

interests in safety as well, residential picketing is likewise least entitled to extensive protection as speech.

Most directly, ACORN v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986), held streets not to be a traditional public forum for purposes of soliciting donations. Id. at 871. The court held that, given traffic considerations, a full public forum did not exist in an intersection. Id. The court observed that "[t]he cases cited . . . refer to 'streets' as public forums, typically in the context of sidewalks and other locales traditionally reserved for public communication." Id. at 870 (emphasis supplied). It should be observed again that the residential streets here have no sidewalks, nor any area at all "traditionally reserved for public communication."

Likewise, this Court in Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), held that sidewalks, crosswalks, curbs, lampposts, hydrants, trees,

shrubs, and other various items of public property in public rights-of-way did not constitute a public forum at all. Id. at 814. In examining the matter, the Court noted the city's power to improve its appearance, and stated that "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." Id. Here, as well, Brookfield retains its right to provide for residential privacy, tranquility and safety, goals more fundamental than aesthetic. Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for that purpose. Cf. Student Coalition for Peace v. Lower Merion School Dist., 596 F. Supp. 169 (E.D. Pa. 1984) (aff'd in part, vacated in part, 776 F.2d 431 (3d Cir. 1985) (school facilities, which never had been used for political speech, were nonpublic forums).

Because no traditional picketing forum thus exists, the applicable standard of review

of the anti-residential picketing ordinance herein is whether it is 1) reasonable; and 2) not an effort to suppress expression just because the public officials oppose the speaker's views. Cornelius, 475 U.S. at 806; Vincent, 466 U.S. at 789. The latter is clear; and, indeed, no such animus was alleged here. As to reasonableness, it is submitted on the strength of the foregoing facts and argument and the following observations that the regulation was not only reasonably authorized by the circumstances, it was absolutely required. Under this test, there is no requirement that restrictions of access be narrowly tailored or that the government's interest be substantial, although, as will be seen infra, both were the case here.

III. Assuming Brookfield's Residential Streets Constitute a Full Public Forum, The Residential Ordinance Is A Constitutional Time, Place and Manner Regulation Of Speech.

A time, place, and manner regulation of speech in a public forum, such as a public street, is constitutional if it passes the

test laid out in Perry Education Association v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983). The regulation must be 1) content neutral, 2) designed to advance a significant governmental interest, 3) narrowly tailored to promote that significant governmental interest, and 4) leave open ample alternative channels of communication. Id. at 45.

A. The Ordinance Does not Ban Picketing Based on the Point of View of the Picketers, so is Content Neutral

The district court correctly concluded that the ordinance is content neutral (Jurisdictional Statement at A-17). The ordinance bans picketing in residential areas to promote any point of view. An earlier version of the ordinance would have barred all residential picketing except labor picketing, but that version was repealed based on this Court's decision in Carey v. Brown, 447 U.S. 455 (1980). In that case, the Court held that a residential picketing ordinance that expressly excepted labor picketing violated the equal protection clause of the Constitution. Id. at

471. The picketers allege that an implied exception for labor picketing nevertheless must be read into Brookfield's ordinance because of a state law, Wis. Stat. § 103.53(1)(e), (g), (l), which authorized certain types of labor picketing. If the ordinance allows labor picketing in residential areas, but disallows other types of picketing, the Equal Protection Clause of the Constitution is violated, according to the picketers. The Carey court expressly reserved judgment on whether an ordinance, like Brookfield's, that barred all residential picketing regardless of subject matter was unconstitutional, however. Id. at 459, n.2. In addition, the legislative history of Brookfield's ordinance shows the intent to avoid the problems with the Carey ordinance. Finally, the issue of whether implied exception for labor picketing must be read into the ordinance is a question of construction of state law, and is more appropriately addressed by the state courts.

Because Brookfield's ordinance does not favor or disfavor speech of any particular point of view, the ordinance is content neutral.

B. The Ordinance Promotes the Significant Interests of the Town of Brookfield of Protecting the Privacy and Safety of its Residents

The interests the Town of Brookfield seeks to advance by the ordinance are public safety and privacy (Jurisdictional Statement at A-26 to A-27). These are significant interests, as the district court correctly concluded (see Jurisdictional Statement at A-18). Maintaining the safety of public streets is clearly one of the responsibilities of a municipality. Streets in residential Brookfield are only thirty feet wide, and there are no sidewalks. Picketers walking on the street undoubtedly place themselves in danger from passing vehicles. This would be particularly true if, as in this case, the picketers parked cars and buses on the street. Other pedestrians using the street also would be endangered because drivers would become

distracted by the picketers. Vehicular traffic would be interfered with as well.

Brookfield's restriction of picketing on residential streets is intended to prevent these problems and aid in carrying out the Town's duty. Even in traditional public forums, restrictions on speech are permitted to promote public safety. In Cox. v. Louisiana, 379 U.S. 536 (1965), this Court stated that a restriction to control travel on public streets, "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection." Id. at 557.

An equal, if not more important, government interest advanced by the ordinance is privacy. The district court correctly found that protecting the privacy of the home is a significant enough interest to justify regulation of speech (See Jurisdictional

Statement at A-18). This Court has recognized that:

[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual to "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick."

Carey v. Brown, 447 U.S. at 471 (quoting Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

Maintaining safety and privacy can be seen as "'preserv[ing] the quality of urban life,'" which is an interest that "'must be accorded high respect.'" City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)) (upholding zoning ordinance that prohibited adult movie theaters from locating within 1000 feet of a residential area, church, park or school). By enacting an ordinance to protect the safety and privacy of its residents, Brookfield is promoting significant govern-

mental interests, and this element of a constitutional time, place, and manner regulation is met.

C. The Ordinance Restricts Only the Necessary Amount of Expression to Advance Brookfield's Interests, so is Narrowly Tailored

It is well settled that picketing is the type of conduct that may be regulated by a narrowly drawn statute. See Cox v. Louisiana, 379 U.S. 559, 563 (1965). In contrast to its findings on the issues of content neutrality and significance, the district court erred in its determination that Brookfield's residential picketing ordinance is not narrowly tailored. The district court did not specify the standard it used in analyzing this element, but the correct standard was articulated by this Court in Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In its analysis of the constitutionality of a city ordinance that prohibited posting signs on public property, the Court stated that "the city did no more than eliminate the exact

source of the evil [visual blight] it sought to remedy." Id. at 808. The Court contrasted the ordinance with the one found unconstitutional in Schneider v. New Jersey, 308 U.S. 147 (1939), which prohibited all handbilling on streets as a way to reduce litter:

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In Schneider, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil - visual blight - is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to Schneider, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.*

* The Second, Seventh and Eighth Circuit Courts of Appeals have adopted a different standard in analyzing the "narrowly tailored" element of the test of a time, place, and manner regulation of speech. Those courts require that a regulation be the "least

Brookfield's ordinance likewise "curtails no more speech than is necessary to accomplish its purpose." The evils the Town is attempting to prevent are unsafe streets and invasion of residential privacy. The medium of expression -- picketing -- creates these evils, as discussed supra. Picketing is not defined in the Brookfield ordinance, but a generally accepted definition is: "to walk or stand in front of as a picket . . ." Webster's Third International Dictionary 1710 (1961). A "picket" is defined as "a person posted by a

restrictive" means of restricting speech that will serve the governmental objective. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, U.S., 107 S. Ct. 919, 920 (1987); Ass'n of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983); New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232 (2d Cir. 1982). However, this Court has stated that "[t]he less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." Regan v. Time, Inc., 468 U.S. 641, 652 (1984); see also City of Watseka v. Illinois Public Action Council, U.S., 107 S. Ct. 919, 920 (1987) (White, J., dissenting).

labor organization at an approach to the place of work affected by a strike . . .; also: one posted similarly in a demonstration as a protest against a policy of government." Id. See also 48A Am. Jur. 2d Labor and Labor Disputes § 2051 (1979). Persons engaged in this sort of activity in residential areas, especially where there are no sidewalks, create a threat to safety and an invasion of the privacy of homes.

The amount of speech curtailed is small; only picketing is prohibited, while many other forms of expression, as discussed infra, are allowed. The complete ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of the person whose home is being picketed:

Unlike sound trucks, it is not just the distraction of the noise which is in issue - it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in Wauwatosa v. King, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971):

"To those inside . . . the home becomes something less than a home when and while

the picketing . . . continues[s]. . . .
[The] tensions and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility."

Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a stranger lurks outside our home.

Carey v. Brown, 447 U.S. at 478-79 (Rehnquist, J., dissenting). Picketing also disturbs the privacy of neighbors and family members of the picketed person, making it an especially intrusive form of expression. Furthermore, even a single picket could distract motorists and be a hazard to himself and others.

The district court suggested that the ordinance could be narrowed by limiting the time of day during which picketing could occur, or by placing a seasonal restriction on the activity (Jurisdictional Statement at A-19). Privacy and safety would suffer no matter what time of day or year the picketing occurred, however. In addition, ordinances restricting the time during which speech

activities can be carried out in neighborhoods have been found unconstitutional. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___U.S.___, 107 S. Ct. 919, 920 (1987) (ordinance limiting door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m. Monday through Saturday unconstitutional); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1259 (7th Cir. 1985) (ordinance prohibiting door-to-door soliciting between 8:00 p.m. and 8:00 a.m. unconstitutional as applied to the hour between 8:00 p.m. and 9:00 p.m.). A seasonal restriction also would not advance Brookfield's interests sufficiently. While picketing could be more dangerous during the winter because of slippery streets and obstructed vision, it would be more disruptive of tranquility during the summer because of open windows and residents out of doors.

Finally, the Town of Brookfield has the responsibility to protect its citizens from unwanted and dangerous intrusions into their

lives. "It is the [municipality], not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution." Carey v. Brown, 447 U.S. at 478 (Rehnquist, J., dissenting). The Town has determined that a ban on residential picketing is the only way to protect the safety and privacy of its citizens, while still allowing the protesters other methods of expressing their views.

Brookfield's purpose in enacting the ordinance was to eliminate only those oppressive activities that disrupt safety and privacy, and only in residential areas. The Town accomplished its purpose by enacting this narrowly drawn ordinance, which passes the narrowly tailored test required of a constitutional time, place, and manner regulation.

D. The Ordinance Allows Numerous Other Types of Expressive Activity, so Leaves Open Ample Alternative Channels of Communication

The final element of the four-part test of a time, place, and manner regulation requires that the regulation allow ample alternative channels of communication. The district court did not determine whether this element had been met because of its decision that the ordinance was not narrowly tailored. Nevertheless, the picketers here do have ample alternative means by which to communicate their message to the public.

The ordinance prohibits only picketing, defined as standing or patrolling, in residential areas of Brookfield. Protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching, see Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). They may go door-to-door to proselytize their views. They may distribute literature in this manner, see Martin v. City of Struthers, 319

U.S. 141, 143 (1943), or through the mails. They may contact residents by telephone, short of harassment. They are barred only from picketing in residential areas, due to the uniquely invasive and potentially dangerous nature of that particular conduct.

The picketers in this case have not shown that they have a particular need to picket in residential areas. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) ("nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication . . ."). They may picket or engage in other forms of peaceful protest in commercial areas of Brookfield. The availability of other forums is a "highly relevant factor in determining the appropriate balance" between speech interests and other substantial governmental interests. Carey v. Brown, 477 U.S. 455, 482, n. 3 (Rehnquist, J., dissenting).

Like the municipality in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which limited the area in which adult theaters could operate, the Town here has given the picketers a "reasonable opportunity" to express their views. See Renton, 475 U.S. at 54. In that case, the Court went so far as to state that "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . ." Id. (emphasis added). Brookfield's residential picketing ordinance cannot be said to deny protesters a reasonable opportunity to communicate their views within the Town. They may use methods other than picketing to protest in residential areas, and all peaceful methods to protest in other areas. The ordinance leaves open ample alternative channels of communication, thus it meets all four of the requirements of a constitutional time, place, and manner regulation of speech.

IV. The Residential Picketing Does Not Significantly Compromise Free Speech Rights of Parties Not Before the Court, so the Ordinance is Not Overbroad

The district court did not reach the alternative argument of the picketers that the residential picketing ordinance is unconstitutionally overbroad. Nevertheless, it is appropriate to discuss that argument in general defense of the constitutional validity of the ordinance.

This Court has stated that, particularly if conduct and not merely speech is involved, "the over-breadth of a statute must not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Board of Airport Comm'rs v. Jews for Jesus, Inc., ___ U.S. ___, ___, 107 S. Ct. 2568, 2571 (1987); Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 799-801; New York v. Ferber, 458 U.S. 747, 770-71 (1982). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it

susceptible to an over-breadth challenge." Vincent, 466 U.S. at 800. Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Id. at 801.

The type of speech restriction that has been held overbroad is found in Board of Airport Comm'rs v. Jews for Jesus, Inc., ___ U.S. ___, 107 S. Ct. 2568 (1987). In that case the Board of Airport Commissioners adopted a resolution that prohibited all First Amendment activities at Los Angeles International Airport. 107 S. Ct. at 2570. This absolute prohibition of speech would have reached activities by respondents in the case, who had distributed religious literature, but also activities such as talking, reading, and wearing campaign buttons. Id. at 2572. "[V]irtually every individual who [entered the airport could] be found to violate the resolution by engaging in some 'First

Amendment activit[y].'" Id. The resolution therefore violated the overbreadth doctrine. Id. at 2571.

The Town of Brookfield's residential picketing ordinance is in no way as restrictive as the resolution in Board of Airport Commissioners. As discussed supra, the only speech activity that is restricted is picketing; other expressive activities are allowed. And the only area of the Town where even picketing is disallowed is the residential area. Picketing, as well as all other expressive activities, is allowed in the commercial area.

No doubt one could imagine an application of Brookfield's residential picketing ordinance that would be an impermissible restriction of speech. The Eighth Circuit Court of Appeals in Pursley v. City of Fayetteville, 820 F.2d 951 (8th Cir. 1987), did just that when it examined an ordinance similar to Brookfield's, and determined that it was overbroad. Id. at 957. The court stated that

because residences are "often located close to the hubbub of daily commerce," the ordinance, which prohibited demonstrations and picketing "before or about the residence or dwelling place of any individual," could prohibit picketing in busy commercial areas. Id. at 956. That result would not advance the city's goals of protecting its citizens' peace at home, according to the court. Id. A similar problem would not arise in Brookfield. The town is segregated into residential and commercial areas, with the commercial area located along State Highway 18. The ordinance would not prohibit picketing in the commercial area, and would advance the Town's goals of preserving residential privacy and safety.

In addition, ordinances and statutes "should not be deemed facially invalid unless [they are] not readily subject to a narrowing construction by the state courts." Ernoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). The Pursley court failed to consider the possibility of a state court narrowing the

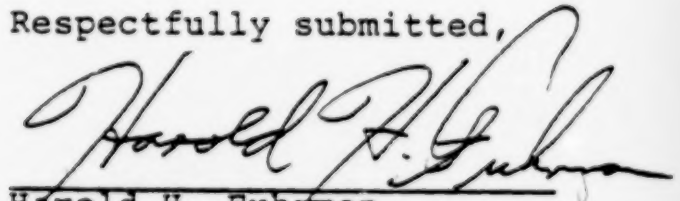
construction of the ordinance if a situation ever arose that required such action. See id. at 958 (Gibson, J., dissenting). The Brookfield ordinance also could be narrowed by a state court if necessary. However, any narrowing of the ordinance as it is written, for example by limiting the number of picketers or the time of picketing, would not advance Brookfield's legitimate goals of protecting the safety and privacy of Brookfield residents, as discussed earlier.

Brookfield's residential picketing ordinance is not so broad that there is "a realistic danger that [it] will significantly compromise recognized First Amendment protections of parties not before the Court," see Vincent, 466 U.S. at 800, and therefore an overbreadth challenge is inappropriate.

CONCLUSION

The judgment of the court of appeals
should be reversed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Harold H. Fuhrman", written over a horizontal line.

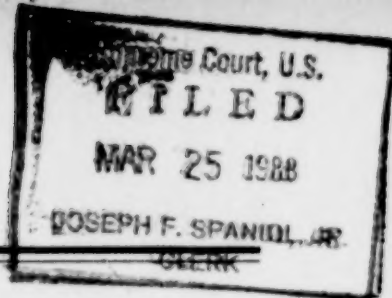
Harold H. Fuhrman

George A. Schmus

Attorneys for Appellants

February 22, 1988

(9)
No. 87-168



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

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6100

QUESTIONS PRESENTED

1. Whether this Court has appellate jurisdiction, under 28 U.S.C. § 1254(2), to review the affirmance, by an equally divided court of appeals, of an order granting a preliminary injunction.

2. Whether, in the absence of appellate jurisdiction, this Court should review a case in which the only question is whether the district court abused its discretion in granting a preliminary injunction.

3. Whether the district court exercised permissible discretion by preliminarily enjoining an ordinance banning any and all picketing before or about any residence or dwelling, and in particular:

- a. Whether an ordinance banning any and all picketing before or about any residence or dwelling likely violates the equal protection clause of the fourteenth amendment, when under state law the ordinance does not apply to certain labor picketing.
- b. Whether an ordinance banning any and all picketing before or about any residence or dwelling, including peaceful public issue picketing on public streets, likely violates the right to free speech under the first amendment.

PARTIES

The defendants in the district court, Russell Frisby, George R. Hunt, Robert Wargowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield, are the appellants in this Court. Mr. Hunt, a public officer and party to this proceeding in his official capacity, has died, and been succeeded in office by Harry L. Behrens.

The plaintiffs in the district court, Sandra C. Schultz and Robert C. Braun, are the appellees in this Court.

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No. 87-168

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
 COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

STATEMENT OF THE CASE¹

Appellees Sandra C. Schultz and Robert C. Braun are advocates of the right to life of all human beings, including children conceived but not yet born. J.S. at A-5. Benjamin M. Victoria, a resident of the Town of Brookfield, Wisconsin, destroys such children at abortion businesses in Milwaukee and Appleton, Wisconsin. J.S. at A-6.

¹ In this brief, "J.S." refers to the jurisdictional statement, "JA" refers to the joint appendix, and "R." refers to the record of docket entries.

Schultz, Braun, and other individuals picketed on several occasions on the public street outside Victoria's Brookfield residence.² J.S. at A-5 to A-6. The town board of the Town of Brookfield responded by enacting a ban on all residential picketing except for certain labor picketing. J.S. at A-7. Subsequently the town repealed that ordinance and replaced it with a flat ban on all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2). J.S. at A-7 to A-9.

When the picketing ban became effective, Schultz and Braun ceased picketing for fear of arrest and prosecution under the anti-picketing ordinance. J.S. at A-10.

Schultz and Braun brought suit in federal district court, seeking injunctive and declaratory relief. JA-1. They named as defendants the three members of the town board, the chief of police, the town attorney, and the Town of Brookfield itself, all appellants before this Court. JA-2 to JA-3.

The U.S. District Court for the Eastern District of Wisconsin granted the motion of appellees Schultz and Braun (hereinafter, "the picketers") for a preliminary injunction, ordering

² In her affidavit filed in the district court, appellee Schultz explained, JA-36 to 37, that she wished to picket in order to:

- (a) express my opposition to abortion,
- (b) inform those living in Victoria's neighborhood of the fact that Victoria performs abortions,
- (c) express to Victoria my sincere and profound opposition to his performance of abortions,
- (d) inform those living in the area and all who learn of the picketing that abortion is a matter of concern for local communities and not just an abstract and distant political matter,
- (e) communicate my opposition to abortion in a location at which my efforts will least interfere with the efforts of sidewalk counselors to contact prospective abortion clients,
- (f) exercise and express my support for the right to freedom of expression on public streets and sidewalks.

Appellee Braun expressed similar concerns. See JA-29 to JA-30 (Affidavit of Robert C. Braun).

appellants (hereinafter collectively referred to as "the town") not to enforce the Brookfield picketing ban. *Schultz v. Frisby*, 619 F. Supp.792 (E.D. Wis. 1985). See J.S. at A-3 to A-23. The order of the district court provided that "if the defendants do not appeal and the court does not receive within sixty days . . . a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction," the preliminary injunction would become permanent without further notice. J.S. at A-23.

The town submitted a timely written request for a trial on the picketers' request for a permanent injunction, R.43,³ and simultaneously appealed the order granting a preliminary injunction, R.42.

A panel of the U.S. Court of Appeals for the Seventh Circuit, by a 2-1 vote, affirmed. *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986). See JA-85 to JA-208. At the request of the town, the Seventh Circuit subsequently agreed to rehear the case en banc, and vacated the panel decision for this purpose. 818 F.2d 1284 (7th Cir. 1987). See J.S. at A-2. Finally, the en banc court affirmed, by an equally divided court, the judgment of the district court. 822 F.2d 642 (7th Cir. 1987). See J.S. at A-1 to A-1-b.

The town then appealed to this court, which postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. *Frisby v. Schultz*, 108 S. Ct. 692 (1988).

SUMMARY OF ARGUMENT

This case involves the review of a preliminary injunction. Appellees (the picketers) brought suit in federal district court challenging a town ordinance banning picketing "before or about the residence or dwelling" of any individual. The district court issued a preliminary injunction ordering appellants (the town) not to enforce the anti-picketing ordinance.

³ The district court has stayed the trial pending the town's appeal of the preliminary injunction. R.45.

The court of appeals affirmed the district court order by an equally divided court, and the town has attempted to appeal to this Court.

The Court does not have appellate jurisdiction over the present case, and therefore should dismiss the appeal. Treating the attempted appeal as a petition for a writ of certiorari, the Court should deny the petition. If the Court decides to grant certiorari, it should affirm the judgment of the court of appeals. The district court did not abuse its discretion in issuing a preliminary injunction, and hence the court of appeals properly affirmed the district court.

Appeal jurisdiction does not lie in the present case. The statute which the town invokes in support of its appeal, 28 U.S.C. § 1254(2), does not apply unless two requirements are met: first, there must be a final judgment for review, *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169, 2175-76 (1986); and second, the court of appeals must have squarely held that a state law (or municipal ordinance) is unconstitutional, *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 470 n.12 (1985). The town's attempted appeal satisfies neither requirement. The district court granted only preliminary relief, and the town has requested a trial on the merits of the case; hence, there is no final judgment. Moreover, the district court merely held that the ordinance was "likely to fail" the test of constitutionality. The court of appeals affirmed by an equally divided court, and without an opinion; its decision, therefore, only stands for the proposition that the district court did not abuse its discretion in granting preliminary injunctive relief. The court of appeals did not hold the challenged ordinance unconstitutional. This Court should accordingly dismiss the appeal for want of jurisdiction.

Treating the town's defective appeal as a petition for a writ of certiorari, the Court should deny the petition. The only question properly before this Court is whether the district court abused its discretion in granting preliminary relief. The sharply abbreviated record, moreover, makes this case an inappropriate vehicle for the town's challenges to established first amendment jurisprudence.

If this Court chooses nevertheless to grant certiorari, it should affirm the judgment of the court of appeals. In reviewing a preliminary injunction, an appellate court need only determine whether the district court abused its discretion in granting relief.

In this case the district court properly concluded that the picketers were entitled to a preliminary injunction. The court found that: the picketers faced irreparable injury from the denial of their freedom to engage in expressive activity; this injury outweighed any apparent injury to the town; a preliminary injunction would not disserve the public interest; and, the picketers were reasonably likely to prevail on the merits of their challenge to the anti-picketing ordinance.

The town has only seriously contested the district court's conclusion that the picketers were likely to succeed on the merits of their case.

The district court, however, had more than ample grounds for concluding that the picketers were reasonably likely to succeed on the merits of their challenge to the Brookfield picketing ban.

In the first place, the Brookfield ban likely violates the equal protection clause of the fourteenth amendment. A law which generally prohibits residential picketing but which does not apply to certain labor picketing impermissibly discriminates on the basis of the content of the picketer's message. *Carey v. Brown*, 447 U.S. 455 (1980). Although the Brookfield ordinance purports to prohibit all residential picketing whatsoever, the town is powerless, under state law, to forbid activity authorized by state statute. Wisconsin labor law explicitly protects the peaceful picketing, on public streets, of a place of employment involved in a labor dispute. Wis. Stat. § 103.53(1). This statute applies when the place of employment is a residence. *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W.2d 270 (1936), *aff'd*, 301 U.S. 468 (1937). Consequently, the Brookfield ordinance cannot apply to certain residential labor picketing, and its application to nonlabor picketers violates the equal protection clause.

Secondly, the Brookfield picketing ban likely violates the right to free speech under the first and fourteenth amendments. Peaceful picketing is expressive activity receiving first amendment protection. Moreover, residential streets constitute public fora. *Carey v. Brown*.

The ability of a governmental body to restrict expressive activity in a public forum is sharply limited. It may enforce reasonable time, place, and manner regulations, but such regulations must be content-neutral, must be narrowly tailored to further a significant government interest, and must allow for ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177 (1983). As the district court correctly held, the Brookfield picketing ban is not narrowly tailored to further a significant government interest.

The Brookfield ban bears no logical relationship to the town's asserted interest in safety: it arbitrarily singles out and prohibits a form of expressive activity — picketing — rather than evenhandedly regulating pedestrian traffic in response to genuine threats to safety.

The town's asserted interest in residential privacy, meanwhile, is limited primarily to the home and, to a lesser extent, to the surrounding private property. Privacy concerns do not provide an adequate basis for outlawing peaceful, expressive activity in a public forum.

Finally, the Brookfield ban does not limit itself to abusive conduct that actually threatens legitimate governmental interests; instead, the ordinance broadly prohibits picketing. As a flat ban on expressive activity, the Brookfield ordinance runs afoul of a long line of decisions rejecting broad prophylactic rules and requiring precision of regulation in the area of first amendment freedoms.

This Court should dismiss the appeal for want of jurisdiction, and, treating the defective appeal as a petition for a writ of certiorari, deny the petition. In the alternative, the Court should affirm the judgment of the court of appeals.

ARGUMENT

Before this Court is an attempted appeal from a judgment of a court of appeals. That court affirmed a district court decision to grant a preliminary injunction, and remanded the case for further proceedings. The underlying litigation involves a constitutional challenge, by two picketers (appellees), to an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

The Court lacks appellate jurisdiction over the town's (appellants') appeal, and should therefore dismiss that appeal. Treating the appeal as a petition for a writ of certiorari, this Court should deny the petition. If the Court decides to grant the petition, it should affirm the judgment of the court of appeals.

I. THIS COURT DOES NOT HAVE APPELLATE JURISDICTION OVER THE PRESENT CASE.

The town invokes 28 U.S.C. § 1254(2) as the basis for its appeal to this Court. That statute, however, does not authorize an appeal in the present case because there has been no final judgment, and because the court of appeals has not squarely held the municipal ordinance in question to be unconstitutional.

Section 1254(2) provides for "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution" This provision imposes two requirements, relevant to the case at bar, before an appeal will lie: first, there must be a final judgment; and second, the court of appeals must actually have held unconstitutional some state or local law. The town's attempted appeal fails to satisfy either requirement.

A. There is No Final Judgment.

This Court recently held that finality is a definite requirement for an appeal under section 1254(2). The present case, however, involves an appeal from a judgment affirming a preliminary injunction and remanding the case for further proceedings, such as a trial. Hence, there is no final judgment, and no basis for appellate jurisdiction.

In *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169 (1986), this Court authoritatively settled the question whether section 1254(2) applies in the absence of a final judgment:

We have concluded that it is time that this undecided issue be resolved. We therefore hold, on the reasoning of *McLish v. Roff*, 141 U.S. [662, 665-68 (1891)], that in a situation . . . where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under § 1254(2).

106 S. Ct. at 2176.

There is no final judgment in the case at bar. The district court has only granted the picketers' request for a preliminary injunction; it has not ruled on the ultimate merits of the case. Indeed, the court explicitly presented the town with the option of requesting a trial on the issue of a permanent injunction. 619 F. Supp. at 798. See J.S. at A-23. The town has exercised that option, R. 43, and thus fully retains the right to resist a final judgment in favor of the picketers.

When the court of appeals affirmed the district court, it remanded the case for "any further proceedings deemed necessary." 822 F.2d 642. See J.S. at A-1. Obviously, the town remains free to pursue a trial in the district court.

The present case therefore does not satisfy the finality requirement of section 1254(2).

B. The Court of Appeals Has Not Squarely Held the Brookfield Picketing Ban to be Unconstitutional.

"Jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 470 n.12 (1985) (citation omitted) (emphasis in original). Although the municipal ordinance at issue in the present case is a "State statute" for purposes of section 1254(2), see *City of New Orleans v. Dukes*, 472 U.S. 297, 301 (1976) (per curiam), the court of appeals has by no means "squarely held" the challenged ordinance to be unconstitutional.

In *Burger King*, the parties had stipulated to a particular construction of a Florida statute, and the court of appeals held the statute, as so construed, to be unconstitutional. 471 U.S. at 470 n.12. This Court found itself without appellate jurisdiction solely because of a possible difference between the stipulated scope and the actual reach of the state law. *Id.* "Consistent with 'our practice of strict construction' of § 1254(2), . . . we believe that . . . it must be reasonably clear that the court independently concluded that the challenged statute governs the case and held the statute itself unconstitutional as so applied." *Id.* (quoting *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (per curiam)). Accord *Doran v. Salem's Inn*, 422 U.S. 922, 927 (1975).

In *Doran*, this Court dismissed an attempted appeal from the affirmance of a preliminary injunction. The Court noted that in reviewing a preliminary injunction, the appellate court need only have found "a sufficient showing of the likelihood of ultimate success on the merits," 422 U.S. at 932, and need not have ruled upon the "ultimate merits" of the case, *id.* at 934. Since the court of appeals "considered the merits only for the purpose of ruling on the propriety of preliminary injunctive relief," *id.* at 927, this Court was "less than completely certain that the Court of Appeals did in fact hold [the ordinance] to be unconstitutional," *id.*

In the present case, the district court explicitly limited its decision to a conclusion that the challenged ordinance was "likely" to fail the governing constitutional standard, and that the picketers were therefore "reasonably likely" to succeed on the merits of their claim. 619 F. Supp. at 798. See J.S. at A-22. The court of appeals affirmed, without opinion, by an equally divided court. 822 F.2d 642. See J.S. at A-1 to A-1-b. There is therefore no basis for concluding that the court of appeals decided anything more than that the district court did not abuse its discretion by granting preliminary injunctive relief. See *Schultz v. Frisby*, 807 F.2d 1339, 1343 (7th Cir. 1986) (original panel opinion) (applying abuse of discretion standard). See JA-100. Cf. *Doran*, 422 U.S. at 934.

The decision of the court below did not "squarely hold" the Brookfield picketing ban to be unconstitutional; hence, no appeal from that decision lies under 28 U.S.C. § 1254(2).

The town's appeal is deficient both because of a lack of finality and the absence of a holding that the challenged ordinance is unconstitutional. This Court should therefore dismiss the appeal for want of jurisdiction.

II. TREATING THE DEFECTIVE APPEAL AS A PETITION FOR CERTIORARI, THIS COURT SHOULD DENY CERTIORARI.

Congress has provided that when this Court faces an unsuccessful attempt to appeal from a decision of the United States court of appeals, "the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari . . ." 28 U.S.C. § 2103. Treating the present appeal as a petition for certiorari, this Court should deny the petition.

At the present stage of the litigation, the only question before the Court is whether the district court exercised proper discretion in granting a preliminary injunction. The court of appeals correctly answered this question in the affirmative, and therefore the matter is not of sufficient importance to merit review.

Furthermore, the town rests its appeal upon calls for major revisions in first amendment jurisprudence. These revisions are unwarranted, and in any event the present record is insufficiently comprehensive and detailed to support a reexamination of, much less a departure from, the settled decisions of this Court.

A. *The Only Question for Review is Whether the District Court Exercised Permissible Discretion in Granting a Preliminary Injunction.*

The only question now before this Court is whether the district court properly granted preliminary injunctive relief.⁴

In reviewing a preliminary injunction, this Court need only determine whether the district court abused its discretion. This deferential standard of review is especially appropriate in the case at bar, which presents a limited record.

When a preliminary injunction is at issue, "the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard [for preliminary injunctive relief], constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (citation omitted) (affirming appeal from affirmance of preliminary injunction). *Accord Brown v. Chote*, 411 U.S. 452, 457 (1973) (affirming preliminary injunction) ("In reviewing such

⁴ The town, both in its statement of the questions presented and throughout its brief to the Court, treats the present case as if the lower federal courts have finally and definitively resolved the litigation on the merits. This is simply not true.

In the first place, the district court ruled only on the propriety of a preliminary injunction. The court explicitly limited its discussion of the merits to an assessment of the likelihood of the picketers' ultimate success. See 619 F. Supp. at 798. J.S. at A-22. In the second place, the district court explicitly recognized the town's (and the picketers') right to demand a trial on the question of a permanent injunction. 619 F. Supp. at 798. J.S. at A-23. The town has availed itself of this option and requested a trial. R. 43.

The court of appeals, for its part, merely affirmed the preliminary injunction and remanded the case "for any further proceedings deemed necessary." 822 F.2d at 642. J.S. at A-1.

interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion") (and cases cited).

This Court has recently recognized the possibility of exceptions to this approach, see *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169, 2176-77 (1986);⁵ nonetheless, "limited review normally is appropriate," *id.* at 2176, and thus "ordinarily" the "abuse of discretion" rule will apply, *id.* at 2177. See also *id.* at 2192 n.1 (White, J., dissenting) (plenary review "may, in rare cases, be an appropriate course of action where the constitutional issues are clear," but "this is by no means the preferred course of action in the run of cases, and I assume that the majority's opinion is not to the contrary"); *id.* at 2207-13 (O'Connor, J., dissenting) (criticizing departure from abuse of discretion standard).

The present case fits within the normal pattern of appeals from preliminary injunctions. In *Thornburgh*, the Court indulged in plenary review when it had before it "an unusually complete factual and legal presentation from which to address the important constitutional issues at stake." 106 S. Ct. at 2177 (quoting the decision of the court of appeals). In contrast, the case at bar presents only a limited record consisting primarily of affidavits and proposed statements of agreed facts. The town has requested a trial on the merits of the case, R. 43, but none has yet taken place.

Thus, the only issue for review is whether the district court abused its discretion. The court of appeals properly upheld the district court order, see *infra* § III; hence, review in this Court is unwarranted.

⁵ In *Thornburgh*, this Court held that the rule limiting review of preliminary injunctions to abuse of discretion "is a rule of orderly judicial administration, not a limit on judicial power." *Id.* at 2177. The *Thornburgh* Court indicated that plenary review of a case could be appropriate when "the unconstitutionality of the particular state action under challenge is clear." *Id.* at 2176. In particular, if the "District Court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id.* at 2177 (emphasis added).

B. *The Town's Appeal Rests Primarily Upon Challenges to Established First Amendment Jurisprudence; Such Challenges Lack Merit, and the Present Record Does Not Facilitate Reexamination of, Much Less Departure From, Settled Precedent.*

In support of its appeal, the town launches attacks upon the prior decisions of this Court. These attacks are without merit; moreover, in light of the present state of the record, this case simply does not provide a proper vehicle for a reexamination of, much less a departure from, settled first amendment jurisprudence.⁶

In essence, the town bases its appeal upon two radical propositions: first, that residential streets in the Town of Brookfield do not constitute public forum property under the first amendment, Brief for Appellants at 21-21; and second, that picketing, even peaceful picketing by a solitary individual on a public way, is inherently and unacceptably destructive of residential privacy, *id.* at 37. Both of these arguments fly in the face of numerous decisions by this Court, and both presuppose factual situations which the record does not support.

The town's argument, for example, that its residential streets are not public fora, presupposes, see *infra* § III(B)(2)(b), that the streets in the Town of Brookfield differ in a dramatic and unprecedented fashion from the streets of other municipalities. The town, however, has presented neither evidence nor authority to support this proposition.

Similarly, the town's argument, that a single, solitary picketer on a public street inherently disrupts residential privacy to an intolerable degree, rests upon factual assumptions about picketing that this Court has never indulged, and that the present record does not support.

At present, the record consists almost entirely of affidavits and proposed statements of agreed facts. There is only minimal evidence regarding the streets in question, none of

⁶ Indeed, this Court need not even reach the first amendment issues in order to sustain the decisions of the courts below. See *infra* § III(B)(1).

which suggests that these streets differ in dramatic and important ways from other residential streets. There is likewise only anecdotal, and disputed, evidence regarding previous picketing incidents, none of which remotely suggests that picketing in the Town of Brookfield is inherently very much different from the picketing protected in other decisions of this Court.

If the town wishes to pursue its revolutionary arguments, it should attempt to identify, if it can, a solid factual basis for them. The proper forum for such a course of action is the district court, not the Supreme Court.

The picketers do not dispute the importance of the constitutional rights and interests underlying the litigation at bar. In its present posture, however, and on its present record, the case does not provide a proper vehicle for the reexamination and revision of first amendment jurisprudence. Since the town's appeal hinges upon such revisions, this court should deny review.⁷

⁷ Should this case go to trial, the picketers of course would also retain the right to explore additional arguments and supplement the record in support of their claims. For example, the picketers would likely use a trial as an opportunity to raise vagueness claims. The town concedes that a protest march through the Town of Brookfield would be lawful, Brief for Appellants at 41, but does not explain the difference between a march and a picket. A trial would enable the parties to determine whether any coherent distinction may be made between picketing and other concededly lawful expressive activities.

In addition, a trial would enable the picketers to test the strength of the town's assertions regarding safety and privacy interests. The district court held that the Brookfield ordinance was likely to fail the constitutional requirement that regulations of expressive activity be narrowly tailored to further legitimate government interests. 619 F. Supp. at 797. J.S. at A-18. In a full-scale trial, the picketers could explore a number of questions in this regard: Is peaceful picketing any more intrusive than door-to-door canvassing? Did the people who complained about the picketers in this case object to the picketing itself, or only to the picketers' message? Does a solitary picketer actually pose a safety threat that is at all different from the threat posed by other pedestrians or by parked cars?

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION.

Should the Court decide to grant review of this case, it should affirm the judgment of the court of appeals, which upheld the district court order granting a preliminary injunction. The only issue on review is whether the district court exercised permissible discretion.

In the present case, the district court applied the proper test for determining whether to grant preliminary injunctive relief. The court did not abuse its discretion in applying that standard to the record before it, and thus the court of appeals correctly affirmed the district court decision.

A. The District Court Employed the Correct Standard for Granting Preliminary Injunctions.

The district court in the present case held the picketers to the following standard for preliminary injunctive relief:

A district court may issue a preliminary injunction only after the moving party demonstrates that —

- (a) it has at least a reasonable likelihood of success on the merits, (2) it has no adequate remedy at law and will otherwise be irreparably harmed, (3) the threatened injury to it outweighs the threatened harm the preliminary injunction may cause the defendants, and (4) the granting of the preliminary injunction will not disserve the public interest.

Schultz v. Frisby, 619 F. Supp. 792, 795-96 (E.D. Wis. 1985) (quoting *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 681 (7th Cir. 1983)) (additional citation omitted). J.S. at A-13. That standard is certainly proper, being at least as stringent as that required by this Court. See, e.g., *Doran*, 422 U.S. at

931 ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits"); *Brown*, 411 U.S. at 456 (trial court properly weighed "the possibilities of success on the merits" and "the possibility that irreparable injury would have resulted, absent interlocutory relief").

B. The District Court Correctly Applied the Governing Standard to the Present Case.

The district court correctly found that preliminary injunctive relief was proper in the case at bar.

The court held that the picketers, facing the loss of the freedom to picket, were clearly threatened with irreparable injury. 619 F. Supp. at 796. J.S. at A-14. See *Elrod v. Burns*, 427 U.S. 7, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (citations omitted). The court also held that, under the facts before it, the injury to the picketers outweighed the possible harm to the town. 619 F. Supp. at 796 ("[t]he injury the defendants would sustain by virtue of a preliminary injunction seems relatively small"). J.S. at A-14. Moreover, the court found, again on the record before it, that "[g]ranteeing the injunction would not disserve the public interest." 619 F. Supp. at 796. J.S. at A-14.

The town has not seriously contested, either in the trial court or on appeal, the conclusions of the district court regarding these three elements of the standard for preliminary injunctions. Rather, as the district court noted, the "only real issue here is whether plaintiffs are reasonably likely to succeed on the merits." 619 F. Supp. at 796. J.S. at A-14 to A-15.

The district court had more than sufficient basis for concluding that the picketers were likely to succeed on the merits of their challenge to the Brookfield picketing ban. Therefore, the district court did not abuse its discretion in granting a preliminary injunction.

1. *The Brookfield ban on residential picketing likely violates equal protection because, by operation of state law, the ordinance does not apply to certain labor picketing.*

The picketers are likely to succeed on their challenge to the Brookfield picketing ban because that ban likely denies the picketers the equal protection of law in contravention of the fourteenth amendment to the United States Constitution.

Although the ordinance, standing alone, allows for no exceptions, the town is powerless, under state law, to outlaw the peaceful residential labor picketing of a place of employment involved in a labor dispute. Hence the Brookfield ordinance, by operation of state law, can only apply in a manner that discriminates on the basis of the content of the picketers' message. Under *Carey v. Brown*, 447 U.S. 455 (1980), such discrimination violates the equal protection clause of the fourteenth amendment.

The key questions for purposes of equal protection analysis are as follows: First, does a law that generally bans residential picketing violate the equal protection of the laws if it does not apply to the peaceful picketing of a place of employment involved in a labor dispute? This Court answered that question in the affirmative in *Carey*. Second, *is the peaceful picketing of a place of employment involved in a labor dispute permitted in the Town of Brookfield*, notwithstanding the terms of the Brookfield ordinance generally banning residential picketing? As a matter of state law, the answer is clearly "yes".

As a consequence, the Brookfield picketing ban operates in precisely the same unconstitutionally discriminatory manner as the statute this Court struck down in *Carey*.

- a. *The differing treatment of labor and nonlabor picketing on residential streets constitutes invidious discrimination against protected expression.*

A law which restricts peaceful picketing on residential streets and sidewalks, but which does not apply to certain labor picketing, violates the equal protection clause of the fourteenth amendment.

In *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated a statute which prohibited residential picketing in most instances, but which did not apply to the peaceful picketing of a place of employment involved in a labor dispute.⁸ See *id.* at 457. The Court noted that "peaceful picketing on the public streets and sidewalks in residential neighborhoods [constitutes] expressive conduct that falls within the First Amendment's preserve." *Id.* at 460 (citation omitted). The Illinois regulatory scheme, by "exempting from its general prohibition only the 'peaceful picketing of a place of employment involved in a labor dispute,' . . . discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* (footnote omitted). Such content-based discrimination violated the equal protection clause, the Court held, since the legislation was not "finely tailored to serve substantial state interests." *Id.* at 461-62. Neither the interest in residential privacy, *id.* at 464-65, nor the interest in special protection for labor protests, *id.* at 466-67, nor any combination of these, *id.* at 467-69, sufficed to justify such discriminatory regulation of picketing; thus, the Illinois anti-picketing statute was unconstitutional.

The rule of *Carey* did not depend upon the incidental fact that the exception for labor picketing appeared in the same provision of Illinois law as the picketing ban itself.

⁸ The Illinois statute provided as follows:

It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interests.

Ill. Rev. Stat. ch. 38, § 21.1-2 (1977).

A law that subjects individuals to impermissibly discriminatory restrictions violates equal protection regardless of whether the source of the discrimination be an explicit exception to the prohibition itself, e.g., *Carey*, an exemption in a separate statutory provision, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987) (state tax scheme), the interplay of laws from different jurisdictions, cf. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984) (examining combined effect, on complaining manufacturer, of tax laws in different states, to illustrate that West Virginia wholesale gross receipts tax discriminates against interstate commerce), or the actual application of the law, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (restriction on laundry facilities applied almost exclusively against Chinese subjects). As this Court held in *Yick Wo*, "whatever may have been the intent of the ordinances as adopted," the resulting restrictions may

amount to a practical denial by the State of that equal protection of the laws which is secured . . . by the . . . Fourteenth Amendment Though the law itself be fair on its face and impartial in appearance, yet, if it is applied . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-74 (citations omitted).

A contrary rule — that a challenged law must be examined in sterile, abstract isolation — would permit governmental bodies to evade the strictures of the equal protection clause simply by employing various legislative drafting devices, or by disregarding (or manipulating) the combined effect of separate laws.

Such technical ploys cannot circumvent the right to equal protection. If Illinois, for example, in order to avoid the *Carey* decision, had reenacted its labor exception as a separate statute (e.g., "any provision to the contrary notwithstanding, peaceful picketing at a place of employment involved in a

labor dispute shall be legal"), a separate, facially complete ban on residential picketing would still be unconstitutionally discriminatory. The ban would be discriminatory, despite the absence of an explicit labor exception, because the independently existing authorization of labor picketing would effectively limit the application of the picketing ban to non-labor picketing. The net effect would be content-based discrimination indistinguishable from that overturned in *Carey*. The State, in short, could not circumvent and frustrate the *Carey* rule by the merely formal device of enacting the unconstitutional law in two distinct pieces.

In the present case, therefore, if the challenged ordinance generally bans residential picketing, but does not apply to certain labor picketing, the ordinance denies nonlabor picketers the equal protection of the laws. It makes no difference, for constitutional purposes, whether the labor exemption arises from an exception in the anti-picketing ordinance, or from a preemptive state law. Nor does it matter whether the town intended to exempt certain labor picketing, or is simply powerless to apply its ban to such picketing.

As the following section illustrates, the rule of *Carey* governs the instant case because the Brookfield ban, by force of superior state labor law, cannot apply to the peaceful picketing of a residence which is also a place of employment involved in a labor dispute.⁹

b. *Despite its absolute terms, the Brookfield ban cannot apply to certain labor picketing authorized under state law.*

The Brookfield ban appears on its face to be content-neutral and completely without exception in its application. As a municipal ordinance, however, the anti-picketing law is subject to higher legal authority, such as state and federal sta-

⁹ Although the town may have had the *intent* to prohibit all picketing, including labor picketing, it nevertheless lacked the *power* to do so. The district court therefore erred when it focused exclusively upon the legislative history and intent of the town in analyzing the equal protection issue. See 619 F. Supp. at 796. J.S. at A-17.

tutes. In the present case, the picketing ban may not, as a matter of state law, apply to the peaceful picketing of a place of employment involved in a labor dispute.

The impact of state law in the present case is clear:¹⁰ Wisconsin labor law sanctions the peaceful picketing of a place of employment (including a residence) involved in a labor dispute; the Brookfield anti-picketing ordinance prohibits, *inter alia*, such picketing, and to that extent conflicts directly with the state labor statute; hence, the Brookfield ordinance must yield to the superior state law, and cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.

- i. Wisconsin labor law explicitly sanctions peaceful picketing on public ways, and this law applies to the peaceful picketing of a residence which is a place of employment involved in a labor dispute.

Wisconsin statutes regulating labor relations explicitly authorize peaceful picketing on public streets, and this statutory authorization applies to residential labor picketing when

¹⁰ The clarity of state law makes abstention and certification inappropriate. As this Court recently observed in *City of Houston, Texas v. Hill*, 107 S. Ct. 2502, 2514 (1987), "when a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute."

Abstention is even less appropriate when, as in the present case, the state supreme court has applied the state labor statute in the context relevant to this case, namely, a place of employment which is a residence and which is involved in a labor dispute. See *infra* § II(B)(1). See also *City of Houston, Texas v. Hill*, 107 S. Ct. at 2514 ("It would be manifestly unfair to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim"). Furthermore, abstention would not preclude a court from issuing interim injunctive relief pending state adjudication, see *Harrison v. NAACP*, 360 U.S. 167, 179 (1959) (ordering abstention) ("the District Court of course possesses ample authority . . . to protect the appellees while this case goes forward"); hence, abstention arguments have no bearing on the present review of a preliminary injunction.

the residence is a place of employment involved in a labor dispute.

Wisconsin provides express statutory protection to certain conduct during labor disputes. In particular, state law sanctions peaceful picketing in public streets and other public ways:

- (1) The following acts, whether performed singly or in concert, shall be legal:

* * *

(e) Giving publicity to and obtaining or communicating information regarding the existence of the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

* * *

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

* * *

(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

Wis. Stat. § 103.53(1).¹¹

This statutory protection for peaceful picketing applies to the picketing of a residence which is a place of employment involved in a labor dispute. In *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936), *aff'd*, 301 U.S. 468 (1937), the Supreme Court of Wisconsin upheld, as an exercise of "rights under the acts of the legislature," 222 Wis. at 390, 268 N.W. at 273, the peaceful union picketing of a tile contractor whose "business was . . . conducted, in the main, from his residence," 301 U.S. at 473. In *Senn*, the union "put in front of [Senn's] house two men carrying signs . . . [a]nd regularly from eight in the morning until noon and from one to four in the afternoon it carried on picketing of that sort, sometimes using four men." 301 U.S. at 485 (Butler, J., dissenting).¹² Neither the majority nor the dissenters, in this Court or in the state supreme court, contested the proposition that the labor statutes protected picketing on public streets outside a residence as well as on any other streets. Nor has the Supreme Court of Wisconsin subsequently questioned the *Senn* decision on this point.¹³

¹¹ These provisions do not apply to labor picketing in the absence of a labor dispute; on the contrary, Wisconsin law prohibits such picketing. See Wis. Stat. § 103.535 (unlawful to picket when no labor dispute exists).

¹² That the picketing took place at Senn's residence was neither a matter of factual dispute nor the basis for the legal controversy. The litigation centered around two questions: whether a labor dispute existed under state law, and whether the economic pressures sanctioned under Wisconsin law violated the fourteenth amendment. The fact that the picketing involved a residence was treated as incidental, with both the state supreme court and this Court referring almost exclusively to the situs of the picketing as Senn's place of business. Compare 301 U.S. at 475 n.2 ("the unions had caused his automobile to be followed from his place of business to the jobs") with *id.* (continuing preceding quotation) ("the unions agreed . . . that thereafter they would not pursue plaintiff's automobile from his residence to his jobs").

¹³ On the contrary, in *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971), the state supreme court stated that to "permit picket-

(cont'd)

- ii. The Brookfield picketing ban cannot be applied to prohibit peaceful labor picketing protected under state law.

The Town of Brookfield, as a local governmental body, lacks the authority to outlaw labor picketing protected under state law. Consequently, the Brookfield picketing ban cannot apply to the peaceful picketing of a place of employment (including a residence) involved in a labor dispute.

Under Wisconsin law, a town can acquire a certain legislative capacity by assuming the powers of a village. See Wis. Stat. § 60.10(2)(c). Villages, in turn, have a limited authority "to determine their local affairs and government . . ." Wis. Const. art. XI, § 3.

This authority, however, must yield to contrary state legislation in two instances relevant to the present case. First, village (and thus town) "ordinances under the police power must be consistent and not in conflict with the law of the state." *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 339, 77 N.W.2d 699, 702 (1956). Second, village (and thus town) ordinances are "subject . . . to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village." Wis. Const. art. XI § 3.

As a conflicting police power regulation,¹⁴ the Brookfield ban must give way to the state authorization of certain labor picketing. Regardless of whether the ordinance, viewed in isolation, would be a valid exercise of local authority, it cannot apply to the peaceful picketing of a place of employment involved in a labor dispute. The state has granted statutory protection to such picketing, including picketing outside a residence, and the town "cannot . . . lawfully forbid what

ing of a place of employment regardless of whether or not it is located in a residential property" was to "assur[e] equal protection" for those employees whose place of employment was in or adjoined a residence. *Id.* at 414, 182 N.W.2d at 538.

¹⁴ The town defends its ordinance as an exercise of the police power. See e.g., Brief for Appellants at 31 (asserting safety and privacy concerns).

the legislature has expressly licensed, authorized or required," " *Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 529, 271 N.W.2d 69, 74 (1978) (quoting *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937)). Hence, the Brookfield ban cannot, as a matter of state law, apply to labor picketing protected under state statutes.¹⁵

Moreover, the anti-picketing ordinance must give way to inconsistent state legislation on a matter of state-wide concern. Labor regulation is plainly a matter of state-wide concern, see Wis. Stat. § 103.51 (declaring the "public policy of the state" regarding collective bargaining, and specifically applying this state policy to, *inter alia*, section 103.53); Wis. Stat. § 111.01 (declaring the "public policy of the state as to employment relations and collective bargaining"); see generally Wis. Stat. §§ 103.01-103.97, 111.01-111.94 (comprehensive state labor legislation). Consequently, the ability of a municipality to act in the area of labor relations faces sharp limitations. See *Anchor Savings and Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 355 N.W.2d 234 (1984).¹⁶ Under *Anchor Savings*, a local law must

¹⁵ An ordinance inconsistent with a state statute is "void so far as it" actually conflicts. *Voss v. Lernerz*, 256 Wis. 183, 187, 40 N.W.2d 519, 520, (1949).

¹⁶ The *Anchor Savings* Court recognized a general four-pronged test for state preemption of local law. Under this test, state legislation "would necessarily nullify the local ordinance" if:

- (1) . . . the legislature has expressly withdrawn the power of municipalities to act;
- (2) . . . the ordinance logically conflicts with the State legislation;
- (3) . . . the ordinance defeats the purpose of the State legislation; or
- (4) . . . the ordinance goes against the spirit of the State legislation.

120 Wis. 2d at 397, 355 N.W.2d at 238.

yield to state legislation not only when it actually conflicts with that legislation, but also if it even goes "contrary to the spirit" of the state regulatory scheme. *Id.* at 402, 355 N.W.2d at 240.

As applied to the peaceful picketing of a place of employment involved in a labor dispute, the Brookfield picketing ban obviously not only violates the "spirit" of state labor law, which expressly protects such picketing, but also directly conflicts with the relevant state legislation. Thus the Brookfield ordinance, as a matter of state preemption¹⁷ in an area of state-wide concern, cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.¹⁸

The Brookfield picketing ban cannot outlaw that which the state has protected. Consequently the ordinance, though neutral on its face, cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.

Under the principles of *Carey v. Brown*, the Brookfield ordinance is likely to be unconstitutional as applied to nonlabor picketers, such as the appellees, who seek to picket in public streets.¹⁹

¹⁷ If federal labor law were to preempt the Wisconsin labor picketing statutes, federal law would likewise preempt the Brookfield ordinance. Thus federal labor law, rather than state labor law, would prevent the application of the Brookfield ordinance to certain labor picketing. In either case, the same impermissible discrimination would result.

¹⁸ "The law is well established that where a state act fully covers a subject or the state otherwise manifests a purpose to establish a uniform state rule pertaining to it, conflicting local ordinances on the same subject are invalid to the extent of the conflict." *Volunteers of America Care Facilities v. Village of Brown Deer*, 97 Wis. 2d 619, 622, 294 N.W.2d 44, 46 (Ct. App. 1980).

¹⁹ This is not to say the town is wholly powerless to regulate picketing without running afoul of the equal protection clause of the fourteenth amendment. The statutory protection of labor picketing, which obviously conflicts with a total ban on picketing, would not necessarily conflict with — and thus preempt — reasonable regulation of the time, place, and manner of picketing. If the town, by employing reasonable regulations, were to avoid a conflict with state law, its regulation would have uniform application, eliminating the problem of impermissible discrimination.

2. *The Brookfield ban on all residential picketing, including peaceful public issue picketing on public streets, violates the constitutional right to free speech.*

The picketers are likely to prevail in their challenge to the Brookfield picketing ban because that ban likely violates the right to free speech.

The picketers wish to be free to engage in peaceful, orderly, public issue picketing on a public street in the Town of Brookfield, Wisconsin. Their intended activity receives constitutional protection under the first amendment to the United States Constitution (as incorporated through the fourteenth amendment), and the town has not offered sufficient justification for wholly banning this expressive activity.

Analysis of the picketers' free speech claim proceeds in three steps. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). First, the Court must determine whether the picketers' intended activity represents speech protected under the first amendment. *Id.* Next, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, the Court must ascertain whether the asserted justifications for the exclusion of expressive activity satisfy the relevant standard. *Id.*

Application of this analysis to the present case illustrates the permissibility as well as the necessity of a preliminary injunction upholding the picketers' rights.

a. *Peaceful picketing constitutes expressive activity under the first amendment.*

First, the picketers' intended activity — peaceful picketing — plainly constitutes protected expression. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited).

In particular, "[t]here can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods . . . [constitutes] expressive conduct that falls within the First Amendment's preserve." *Carey v. Brown*, 447 U.S. 455, 460 (1980) (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)). Moreover, "[p]ublic issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' . . . has always rested on the highest rung of the hierarchy of First Amendment values . . ." *Carey*, 447 U.S. at 466-67 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (additional citations omitted).

b. *Public streets, including public streets in residential neighborhoods, are quintessential public fora.*

Second, the public street on which the picketers wish to picket plainly constitutes a public forum. *Carey*, 447 U.S. at 460-61 (public streets and sidewalks in residential neighborhoods are public forum property).

As long ago as the case of *Hague v. CIO*, 307 U.S. 496 (1939), this Court has recognized that

[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (plurality opinion).

This Court has, for purposes of free speech analysis, identified public places of this kind as "public fora." Streets, sidewalks, and parks represent the "quintessential public

forums." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). On the range of properties open in varying degrees to expressive activities, streets and parks lie at the very "end of the spectrum," *id.*; hence, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.'" *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (quoting *Jamison v. Texas*, 318 U.S. 413, 416 (1943)) (additional citation omitted). *Accord United States v. Grace*, 461 U.S. 171, 177 (1983) (" 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums' ") (and cases cited); *Cornelius*, 473 U.S. at 802 (traditional public fora include public streets and parks).

Indeed, municipal streets and sidewalks set the standard for public forum property. Thus, when this Court reviews an asserted right of access for purposes of free expression, the crucial question is typically whether the forum at issue is sufficiently analogous to municipal streets so as to constitute a public forum. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946) (streets and sidewalks of company town indistinguishable from municipal streets and sidewalks); *Flower v. United States*, 407 U.S. 197 (1972) (per curiam) (street and adjoining sidewalks through military facility indistinguishable from municipal thoroughfare); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping mall not functional equivalent of municipality); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fairgrounds significantly different from municipal streets); *United States v. Grace*, 461 U.S. 171 (1983) (sidewalk on perimeter of Supreme Court grounds indistinguishable from other city sidewalks).

The decisions of this Court, furthermore, do not limit the category of public forum property so as to exclude residential streets and sidewalks. *E.g.* *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (Jehovah's Witness going door-to-door in residential neighborhood "was upon a public street, where he had a right to be, and where he had a right peacefully to

impart his views to others"); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (peaceful march to mayor's residence and demonstration on neighboring streets and sidewalks "well within" scope of first amendment); *Carey v. Brown*, 447 U.S. 455 (1980) (picketing on residential streets and sidewalks is expression in a public forum).

The public forum status of residential streets and sidewalks was a central premise underlying the *Carey* decision. See *Perry*, 460 U.S. at 55 (discussing *Carey* and another case) ("the key to those decisions . . . was the presence of a public forum"). In *Carey*, this Court struck down an anti-residential picketing statute under the equal protection clause of the fourteenth amendment because it "discriminate[d] among speech-related activities in a public forum," *id.* at 461 (emphasis added). Had the residential streets and sidewalks in question not been public fora, a very different — and less demanding — standard of scrutiny would have applied. See e.g., *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

In the present case, the town attempts to challenge the public forum status of its residential streets. See Brief for Appellants at 21-27. In light of the overwhelming Supreme Court precedent to the contrary (which the town acknowledges, *id.* at 21), it is unclear from what source the town anticipates conjuring up this major change in established constitutional doctrine.

A town "may not by its own ipse dixit destroy the 'public forum' status of streets and parks," *USPS v. Greenburgh Civic Association*, 453 U.S. 114, 133 (1981), and the town has presented no evidence to suggest that its streets are radically different from those of any other municipality.

Nor has the town advanced a coherent argument to justify its revolutionary claim.

The town asserts that there is no proof of government ownership of the street in question. Ownership of the street, however, is irrelevant: "[w]herever the title of streets and parks may rest," *Hague*, 307 U.S. at 515 (emphasis added), these properties are "freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S. at 507. It is this openness "for indiscriminate use by the

general public," *Perry*, 460 U.S. at 47, this "traditional right of access," *Taxpayers for Vincent*, 466 U.S. at 814, that characterizes public forum property.

As with the sidewalks surrounding the Supreme Court grounds in *Grace*, "[t]here is no indication whatever to persons stepping [into the residential streets of the Town of Brookfield] that they have entered some special type of enclave" 461 U.S. at 180. The record gives no support whatsoever to the notion that anyone needs a passport, a visa, or a license to stroll the streets of the Town of Brookfield.

The town also claims that as a historical matter, its residential streets have never been held open for picketing or other use by members of the general public. Brief for Appellants at 23-24, 27. There is no record support for this contention.²⁰ Moreover, it is simply not the case that a particular public street must have a history of specific expressive activities before it can be considered a public forum. In *Marsh* and *Flower*, there was no indication that other individuals had previously distributed literature on the streets in question. In *Gregory* and *Carey*, the Court saw no need to inquire whether previous demonstrations of any sort had taken place outside the residence of the mayor. Indeed, in *Hague v. CIO*, there was "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public," 307 U.S. at 505; the Court nevertheless ruled that streets and parks have, "time out of mind," been used for purposes of free expression, *id.* at 515. In short, it is the nature of a public street in general — not its own particular history regarding marches, literature distribution, or picketing — that renders it a public forum.

Finally, the town cites *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788 (1985), for the proposition that traditional forum analysis does not apply, and that the question is whether a "picketing forum" exists. Brief for Appellants at 24-27. This argument misconceives the *Cornelius* decision.

²⁰ Indeed, the town apparently felt powerless to exclude the picketers in the present case before it enacted the challenged ordinance.

Cornelius involved a claim of access to the Combined Federal Campaign (CFC). The excluded parties sought a right, not to enter the federal workplace, but to participate in the CFC program. 473 U.S. at 801. At issue, therefore, was access to a channel of communication, not a particular piece of property. The Court employed "a more tailored approach" to the access question precisely because the case differed from those involving streets and parks. *Id.* Indeed, the Court specifically noted that "[w]hen speakers seek general access to public property, the forum encompasses that property." *Id.* (citation omitted). Hence, the "activity analysis" applied to the facts of *Cornelius* does not apply to the case at bar.

Absent a revolution in constitutional jurisprudence, then, the picketers' intended activity represents constitutionally protected expressive activity in a public forum. The only remaining question is the sufficiency of the town's asserted justifications for banning the picketers.

- c. *The Brookfield ban on expressive activity in a public forum is not narrowly tailored to further a significant government interest.*

The first amendment standard is well-established. In public fora,

the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177 (quoting *Perry*, 460 U.S. at 45) (additional citations omitted).

The Brookfield ban absolutely prohibits all picketing in a public forum, and thus cannot constitute a reasonable time, place, and manner regulation.²¹

The town offers in defense of the picketing ban its interests in safety and residential privacy. Brief for Appellants at 31. Neither interest provides an appropriate or adequate justification for the anti-picketing law in question.

- i. Safety concerns do not justify the Brookfield picketing ban.

The town's interest in maintaining public safety does not justify the anti-picketing law at issue here. A ban on all picketers, and only picketers, bears no logical relationship to safety concerns.

In the first place, there is no evidence to support a conclusion that people who are picketing create any greater hazards than do people who are marching in groups carrying signs — yet the Town concedes the lawfulness of this latter activity, *see* Brief for Appellants at 41.

Nor is there any evidence to indicate that picketing is any more hazardous than any other pedestrian activity on public streets, such as strolling, jogging, or recreation. Yet the town has arbitrarily singled out a particular expressive pedestrian activity for legal prohibition. The Brookfield picketing ban neither limits itself to unsafe pedestrian activity nor ap-

²¹ Because the Brookfield ordinance wholly bans a particular type of expression, it is an "additional restriction" — one which exceeds mere reasonable regulation — which triggers strict scrutiny. *Grace*, 461 U.S. at 177. *Cf. Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 n.16 (1981). Since, as described in the text, the ordinance fails the "narrowly tailored" test for reasonable time, place, and manner regulations, it follows that the ordinance also is not "narrowly drawn" and therefore fails to survive strict scrutiny.

plies evenhandedly to pedestrian hazards regardless of their communicative nature.

Moreover, if picketing actually did increase the risk of car accidents, this risk would be much more serious in the commercial areas of Brookfield, where traffic is both heavier and conducted at higher speeds. Yet the town proposes, and through its ordinance would require, that the picketers take their protest to these more dangerous areas. *See* J.S. at 31.

In *Carey v. Brown*, the Court observed that the "apparent overinclusiveness and underinclusiveness of the . . . restriction would seem largely to undermine [the] claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility." 447 U.S. at 465 (footnote omitted). The same basic deficiencies plague the town's attempt to justify its picketing ban in terms of public safety.

ii. Concern for residential privacy does not justify the Brookfield picketing ban.

The town rests primarily upon the claim that concern for residential privacy justifies its picketing ban. This claim does not withstand constitutional analysis, however. Whatever residential privacy may mean,²² it cannot support the total prohibition of peaceful expression in a public forum. Furthermore, the Brookfield ban is not narrowly tailored to advance the asserted interest.

²² The town has not defined residential privacy. Thus, there is a danger that the assertion of this vague term "privacy" might mask an effort by the town to suppress controversial speech or exclude a point of view with which some residents might disagree. The town has disavowed any desire to restrict the content of the picketers speech, *see* Brief for Appellants at 29-31; hence, the picketers assume that the town's privacy concerns only apply insofar as they have no reference to the impact of the picketers' message.

(a) Residential peace and privacy interests do not justify bans on expressive activity in public fora outside the private domain.

In the first place, the governmental interests in protecting residential peace and privacy do not extend outward from a given dwelling so as to swallow up all expressive rights in the vicinity. Rather, these interests are focused upon — and limited to — the dwelling itself and, to a lesser extent, the accompanying private grounds. Activity outside this residential locus is subject to governmental control only to the extent that it invades that locus.

Thus a municipality might prohibit "loud and raucous noises," *see Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks), because the sounds actually invade and disrupt the peace of a dwelling. Similarly, government may restrict radio broadcasts, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent language aired during daytime hours), and delivery of mailed materials, *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (objectionable mailings), insofar as they involve actual intrusions into the home. Government may, in addition, exercise a more limited regulatory power over door-to-door communicative activities, *see Martin v. Struthers*, 319 U.S. 141 (1943) (flat ban on door-to-door literature distribution impermissible); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (substantial limitation on charitable door-to-door solicitation unconstitutional).

When the communicative activity takes place on public ways or other locations outside the dwelling-place, however, residential peace and privacy concerns simply do not supply an adequate justification for government prohibitions. *E.g.*, *Schaumburg*, 444 U.S. at 638-39 ("The ordinance is not directed to the unique privacy interests of persons residing on their homes because it applies not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways' ")

(quoting ordinance); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) (prohibiting the posting of "For Sale" and "Sold" signs on front lawns does not "restrict a mode of communication that 'intrudes on the privacy of the home [or] makes it impractical for the unwilling viewer or auditor to avoid exposure' ") (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975));²³ see also *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (peaceful leafletting in residential neighborhood may not be enjoined); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (peaceful, orderly singing and marching through residential neighborhood and around mayor's residence not constitutionally punishable).

A comparison of the *Rowan* and *Keefe* cases is illustrative. In *Rowan*, the issue was whether the federal government could "make the householder the exclusive and final judge of what will cross his threshold . . ." 397 U.S. at 736 (emphasis added). The Court unanimously upheld the governmental power to provide this kind of privacy safeguard, holding that a "mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The crucial point of the Court's decision was that unwanted mailings are a "form of trespass," *id.* at 737; thus, the resident could bar such communication from "entering his home," *id.* The homeowner may "erect a wall" against this intrusion, *id.* at 738, because the "right of a mailer, we repeat, stops at the outer boundary of every person's domain," *id.* (emphasis added).

²³ If neither solicitation on the street outside a home nor the posting of signs on a neighbor's lawn threaten residential privacy, then it makes little sense to say that the combination of these two activities — carrying signs on the street in front of a home — can be inimical to residential privacy.

In the *Keefe* case, by contrast, an eight-member majority of the Court²⁴ (seven of whom joined in the *Rowan* decision) summarily rejected residential privacy as a justification for banning peaceful residential leafletting.

Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan* . . ., relied on by respondent, is not in point; *the right of privacy involved in that case is not shown here*. Among other important distinctions, respondent is not attempting to stop the flow of information *into his own household*, but to the public.

402 U.S. at 419-20 (emphasis added).

The interest of the Town of Brookfield in protecting peace and privacy in the home, then, is simply inapposite to the present case. The town may, of course, legitimately regulate conduct which actually intrudes upon the residential domain. In fact, the town already has ordinances prohibiting: trespass to land and dwellings, making loud and unnecessary noises disruptive of private residences, destroying private property, and littering on private property. Town of Brookfield, Wis., Gen. Code, §§ 9.943.13, 9.943.14, 9.06, 9.09, 9.10. See Addendum.

The town does not, however, have license to ban peaceful, orderly picketing in public areas under the guise of protecting residential peace and privacy. The true goal of the Brookfield ban — to prevent "embarrassment and intimidation" of

²⁴ Justice Harlan dissented on jurisdictional grounds.

the picketed resident — simply does not supply a legitimate justification for a ban on speech. “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). As this Court explained in the *Keefe* case,

[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners [the leafletters] plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the function of a newspaper. *See Schneider v. State*, [308 U.S. 147 (1939)]; *Thornhill v. Alabama*, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent’s real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

402 U.S. at 419.

- (b) The Brookfield ban is not narrowly tailored to advance the asserted interests.

Aside from the constitutional impropriety of extending residential peace and privacy concerns beyond their proper domain and into public fora, there is a second fatal deficiency in the proffered justifications of the Brookfield ban: the ordinance is not narrowly tailored to further those interests.

Under the constitutional standards relevant to the regulation of expressive conduct in a public forum, reasonable time, place, and manner regulations must be “narrowly tailored” to serve the relevant government interests, and flat bans on a given type of expression must be “narrowly drawn” to fur-

ther a compelling interest. *United States v. Grace*, 461 U.S. 171, 177 (1983).

These requirements of narrow regulation reflect the principle that in the area of first amendment rights, the state may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (and cases cited). Constitutional rights would be meaningless if the state could sweep them away in the wake of broad laws. The Constitution, therefore, requires government to act with sensitivity to these rights and to allow their full exercise except where their restriction is essential to further an interest of sufficient weight.

Thus, for a law restricting conduct in a public forum to be narrowly tailored, it must “aim specifically at evils within the allowable area of State control [and not], on the contrary, sweep[] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.” *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court overturned convictions under a broad prohibition against breaches of the peace, contrasting such a broad offense with “a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or prescribed.” *Id.* at 236. Examples of the latter, according to the Court, would include “a law regulating traffic” or “a law reasonably limiting the periods” of public access to a certain area. *Id.*

In *Martin v. Struthers*, 319 U.S. 141 (1943), the Court limited a municipality to “traditional legal methods” for controlling criminal activities, declaring that a “stringent prohibition (on door-to-door solicitation) can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.” *Id.* at 147.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court listed as examples of narrowly tailored regulations laws which limited the number of parades at the same time, or forbade parades on busy streets during rush hour, or outlawed exces-

sive noise. *Id.* at 115-16. The anti-noise ordinance in *Grayned* was such a permissible regulation, the Court held, because it prohibited "only conduct which disrupts or is about to disrupt normal school activities," *id.* at 119, namely noise, during a school session or class, which "disturbs or tends to disturb" the school session or class, *see id.* at 107-08 (quoting ordinance). The *Grayned* Court explicitly noted that "[p]eaceful picketing which does not interfere with the ordinary functioning of the school is permitted." *Id.* at 119.

In short, for a law affecting free speech to be narrowly tailored, it must address a specific, objective evil in a direct and evenhanded manner. Impermissible are shortcut or back-door approaches, dragnet prohibitions, and laws which aim directly at expressive activity and only indirectly address legitimate regulatory concerns. As this Court stated in *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1931):

The people through their legislatures may protect themselves against th[e] abuse [of rights to free speech and assembly]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

Viewed in light of these general principles, the Brookfield ban manifestly fails the requirement of narrow tailoring.

- (i) The Brookfield ban does not limit itself to regulating abuses, but instead broadly proscribes expressive activity.

The Brookfield ban demonstrates no sensitivity to constitutional rights. The anti-picketing ordinance completely bans any and all residential picketing, instead of confining itself to abusive conduct.

The town claims the ban is necessary to protect residential safety and privacy. But the ordinance does not prohibit violent, unsafe, or disorderly behavior. Instead, the Brook-

field ban only outlaws picketing, and all picketing, regardless of whether it is peaceful and orderly, or disruptive and abusive.²⁵ The Brookfield ban thus makes picketing itself the object of its legal animosity, instead of addressing abusive behavior that may or may not be associated with picketing.²⁶

The Brookfield ban makes no distinctions and allows for no exceptions in its prohibitory application. While content-based exceptions are, of course, inimical to equal protection, *Carey v. Brown*, 447 U.S. 455 (1980); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *see also supra* § III(B)(1), content-neutral specifications are essential to the narrowing of an otherwise overbroad law. The Brookfield ban, however, makes no effort to distinguish between peaceful picketing and disorderly picketing, between picketing in small numbers or in crowds, between picketing on public streets and sidewalks or on private property, between picketing for a short time or at all hours of the day or night, between picketing on less-traveled roads or on busy thoroughfares. Each of these features bears heavily upon the government interests in safety and privacy. Yet the flat ban the town enacted gives not the slightest heed to any such factors. While laws need not attain microscopic precision, the Brookfield ban presents the opposite extreme of complete insensitivity to the rights and interests at stake.

Gregory v. City of Chicago, 394 U.S. 111 (1969), illustrates the patent invalidity of the Brookfield ban. In *Gregory*, former

²⁵ In fact, the most prominent alleged occurrences to which the town objects — scaring children with reports of a baby-killer, blocking cars entering or leaving driveways, shouting, and tying ribbons on private property, *see J.S.* at A-10 to A-12 (opinion of district court) — do not constitute violations of the anti-picketing ordinance. The town has proceeded in an unconstitutionally backwards fashion, outlawing the exercise of rights in order to prevent abuses.

²⁶ Indeed, in light of existing town ordinances prohibiting loitering, disorderly conduct, trespass, littering, loud noises, destruction of property, and obstruction of traffic, *see Addendum*, it appears that the picketing ban adds nothing except the prohibition of orderly, quiet, peaceful picketing in public places or on other premises by invitation.

Chief Justice Warren proclaimed that the facts presented "a simple case," 394 U.S. at 111, since the protesters' march from city hall to the mayor's residence, where they continued to demonstrate, "falls well within the sphere of conduct protected by the First Amendment," *id.* at 112.²⁷

The *Gregory* case fits into an established first amendment jurisprudence that rejects sweeping and conclusory prohibitions on expressive activity in public fora, and that tolerates only laws which address specific unlawful aspects of the behavior in question. Compare *Lovell v. Griffin*, 303 U.S. 444 (1938) (overturning blanket, wholly discretionary permit requirement for literature distribution); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning flat ban on loitering or picketing at a place of business); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning breach of peace convictions for peaceful demonstration on statehouse grounds); *Cox v. Louisiana (Cox I)*, 379 U.S. 536 (1965) (overturning breach of peace conviction for peaceful march to and demonstration at courthouse; overturning ban on obstruction of public passages where enforcement left to unbridled discretion of authorities); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (overturning disorderly conduct convictions for peaceful march to and demonstration around residential block); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (overturning blanket, wholly discretionary permit requirement for parades and demonstrations); *Organizations for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (overturning blanket injunction against residential leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (overturning flat ban on charitable solicitation, door-to-door or on public ways, by organizations that do not use at least 75% of receipts for charitable purposes); *NAACP v. Claiborne Hardware Co.*, 458 U.S.

²⁷ The facts in *Gregory* were as follows: 85 protestors marched to the mayor's home, arriving at about 8 p.m. They chanted and sang while marching around the block, using streets and sidewalks. At 8:30 p.m., the demonstrators stopped singing and chanting, and marched silently until their arrest and dispersion by police at 9:30 p.m. See 394 U.S. at 126-30 (Appendix to opinion of Black, J., concurring).

886 (1982) (overturning civil liability imposed for nonviolent political boycott and associated speeches and nonviolent picketing); *United States v. Grace*, 461 U.S. 171 (1983) (overturning flat ban on picketing and leafletting as applied to public sidewalks outside Supreme Court Building); *with Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding parade licensing requirement insofar as fairly and non-discriminatorily applied solely to address traffic concerns and not applicable to peaceful picketing); *Cox v. Louisiana (Cox II)*, 379 U.S. 559 (1965) (upholding against facial challenge ban on courthouse picketing "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty"); *Adderly v. Florida*, 385 U.S. 39 (1966) (upholding trespassing law as applied to picketing on jailhouse grounds; state "aimed at conduct of one limited kind," namely, trespassing on nonpublic forum jail grounds); *Cameron v. Johnson*, 390 U.S. 611 (upholding against facial challenge ban on picketing or mass demonstrations which obstruct or unreasonably interfere with ingress, egress, use of public ways, transaction of business or administration of justice); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ban on willful making of noise "which disturbs or tends to disturb" school peace and good order); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding state fair rule limiting solicitation of donations and sale or distribution of literature to specified locations within limited public forum of state fairgrounds: rule does not "deny . . . the right to conduct any desired activity at some point within the forum").

By sheer force of repetition, this long line of decisions firmly establishes the impropriety of "broad prophylactic rules," and the requirement that regulations address only specific, harmful aspects of expressive behavior.

Thus, as a ban on all residential picketing, including peaceful picketing in a public forum, the Brookfield ordinance is patently unconstitutional. *Accord Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951 (8th Cir. 1987), *reh'g and reh'g en banc denied*, No. 86-1332 WA (8th Cir. Aug. 28, 1987); *State v.*

Schuller, 280 Md. 305, 372 A.2d 1076 (1977); *State v. Anonymous*, 6 Conn. Cir. 372, 274 A.2d 897 (1971); *Flores v. City and County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950) (en banc); *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 272 A.2d 622 (1969).

- (ii) Picketing is not inherently proscribable.

The town apparently recognizes the radical nature of its ordinance, and thus to defend the ordinance the town takes a radical legal position: *all* picketing is *inherently* so disruptive of residential well-being and privacy that a flat ban is justified. See Brief for Appellants at 34-40.

The town's position, however, calls for a major departure from established constitutional jurisprudence. As long ago as 1940, this Court refused to consider picketing per se to be a breach of lawfulness sufficient to justify its prohibition.

[N]o clear and present danger of destruction of life or property or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (overturning picketing ban). Subsequent cases have reaffirmed this principle in such varied settings as outside a home, *Carey v. Brown*, 447 U.S. at 469 ("Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests") (footnote omitted), a school, *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians") (footnote omitted), and a courthouse, *Grace*, 461 U.S. at 182 ("A total ban on [picketing and other communicative activity] is no more necessary for the maintenance of peace and tranquility on the

public sidewalks surrounding the [Supreme Court] building than on any other sidewalks in the city").

Moreover, the revision in constitutional law necessary to uphold the town's position would leave first amendment jurisprudence in a state of confusion and disarray.

The distinction between a picket and a march is by no means clear. The town concedes that a march, like that in *Gregory*, would be permitted. Brief for Appellants at 41. But in *Gregory*, the demonstrators carried signs and marched around and around a residential block. 394 U.S. at 126-30 (Appendix to opinion of Black, J., concurring). How far would the picketers have to walk before their picket became a march?

The distinction between a picket and the distribution of leaflets can also be unclear. The latter activity is plainly protected. *E.g.*, *Schneider v. State*, 308 U.S. 147 (1939); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). If individuals going about the streets of Brookfield wear sandwich boards and hand out fliers, are they picketing?

Nor is it clear what a person has to do to qualify as a picketer. If the people involved in this case bore their messages on tee-shirts instead of signs, would they be picketers? If they held a silent vigil on the street in question for five minutes each day, without signs, would they be picketers?

These considerations illustrate the fundamental difficulty of the town's approach. Instead of enacting or enforcing laws aimed at conduct itself — i.e., laws which apply regardless of a person's intent to communicate — the town has targeted an activity that is defined by reference to its expressive purposes. In so doing, the town has crossed the constitutional line separating narrowly tailored time, place, and manner regulations from the direct suppression of free speech.

The Brookfield flat ban is not narrowly tailored to further significant government interests; it therefore fails the test for reasonable time, place and manner regulations of expressive activity. Whereas the town's defense of its anti-picketing ordinance rests upon calls for major revisions in constitutional law, the trial court properly found the picketers to have a

reasonable likelihood of success on the merits of their challenge to the ordinance.

CONCLUSION

The Court lacks appellate jurisdiction over the present case, and therefore should dismiss the appeal. Treating the appeal as a petition for certiorari, the Court should deny the petition. If the Court decides to grant review, it should affirm the judgment of the court of appeals.

Respectfully submitted,

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March 25, 1988

ADDENDUM: Selected Ordinances of the Town of Brookfield, Wis.

9.05 OBSTRUCTING STREETS AND SIDEWALKS PROHIBITED. No person shall stand, sit, loaf, loiter or engage in any sport or exercise on any public street, sidewalk, bridge or public ground within the Town in such manner as to prevent or obstruct the free passage of pedestrian or vehicular traffic thereon or to prevent or hinder free ingress or egress to or from any place of business or amusement, church, public hall or meeting place, except with the permission of the Town Board upon written application to the Board.

9.06 LOUD AND UNNECESSARY NOISE PROHIBITED. No person shall make or cause to be made any loud, disturbing or unnecessary sounds or noises such as may tend to annoy or disturb another in or about any public street, alley, park or any private residence.

9.08 LOITERING PROHIBITED. (1) **LOITERING OR PROWLING.** No person shall loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a police or peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances makes it impracticable, a police or peace officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this subsection if the police or peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the police or peace officer at the time, would have dispelled the alarm.

(2) OBSTRUCTION OF HIGHWAY BY LOITERING.

No person shall obstruct any street, bridge, sidewalk or crossings by lounging or loitering in or upon the same after being requested to move on by any police officer.

(3) OBSTRUCTION OF TRAFFIC BY LOITERING.

No person shall loaf or loiter in groups or crowds upon the public streets, alleys, sidewalks, street crossings or bridges, or in any other public places within the Town, in such manner as to prevent, interfere with or obstruct the ordinary free use of the public streets, sidewalks, street crossings and bridges or other public places by persons passing along and over the same.

(4) LOITERING AFTER BEING REQUESTED TO MOVE.

No person shall loaf or loiter in groups or crowds upon the public streets, sidewalks or adjacent doorways or entrances, street crossings or bridges or in any other public place or on any private premises without invitation from the owner or occupant, after being requested to move by any police officer or by any person in authority at such places.

9.09 DESTRUCTION OF PROPERTY PROHIBITED.

No person shall willfully injure or intentionally deface, destroy or unlawfully remove, take or meddle with any property of any kind or nature belonging to the Town or its departments, or to any private person without the consent of the owner or proper authority.

9.10 LITTERING PROHIBITED.

No person shall throw any glass, garbage, rubbish, waste, slop, dirty water or noxious liquid, or other litter or unwholesome substance upon the streets, alleys, highways, public parks or other property of the Town or upon any private property not owned by him or upon the surface of any body of water within the Town.

9.29.288 to 9.948.16 *OFFENSES AGAINST STATE LAW SUBJECT TO FORFEITURE.* The following statutes following the prefix "9" defining offenses against the peace and good order of the State are adopted by reference to define offenses against the peace and good order of the Town, provided the penalty for commission of such offenses hereunder shall be limited to a forfeiture imposed under § 25.04 of this Code.

9.943.13	Criminal Trespass to Land
9.943.14	Criminal Trespass to Dwelling
9.947.01	Disorderly Conduct

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

CLERK

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Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court
of Appeals for the Seventh Circuit

APPELLANTS' REPLY BRIEF

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Wisconsin Statutes § 340.01(22) provides in pertinent part (defining a highway, inclu-

ding a street): "every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads . . . opened to the use of the public for the purpose of vehicular travel."

ARGUMENT

This case presents the Court with the question of whether a municipality as an exercise of its police power to protect the safety and privacy of its residents, may prohibit picketing in residential areas. This question was expressly left open by the Court in Carey v. Brown, 447 U.S. 455, 459 n. 2 (1980). The Town of Brookfield, Wisconsin (the "Town") determined that the expressive activity involved, picketing, is incompatible with the forum, narrow residential streets without sidewalks. In doing so the Town was required to balance two constitutionally protected rights, privacy and freedom of speech. The Town respectfully submits that its residential picketing ordinance is a constitutional restriction of speech.

I. This Court has Appellate Jurisdiction.

The Seventh Circuit Court of Appeals affirmed, without opinion, the district court's order of a preliminary injunction enjoining the enforcement of Brookfield's residential picketing ordinance, Schultz v. Frisby, 818 F.2d 33 (7th Cir. 1987), aff'g, 619 F. Supp. 792, 798 (E.D. Wis. 1985) (Jurisdictional Statement at A-1 and A-22). The district court determined that the appellees ("the picketers") were likely to succeed on the merits of their constitutional claims (Jurisdictional Statement at A-17 to A-15). When the court of appeals affirmed, therefore, it necessarily held that the ordinance was unconstitutional. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1254(2).

This case arises in a factual vacuum; the picketers picketed only before the Brookfield ordinance became effective. The ordinance has never been enforced or administered, thus all the facts considered by the district court

relate to events that occurred prior to adoption of the ordinance. Those facts are not seriously in dispute. The court therefore addressed only the legal issue of the constitutionality of the ordinance (see Jurisdictional Statement at A-14 to A-15), and that is the only issue that could be addressed if there was a trial. Based on its conclusion that the ordinance was unconstitutional, the district court ordered a temporary injunction that would become permanent if the Town did not appeal and neither party requested a trial (Id. at A-23). The court apparently felt no need to review additional facts in order to make a final decision in the case.

Because the district court rested its decision solely on the grounds that the picketers were likely to succeed on their constitutional argument (see id. at A-14 to A-15), that is the only grounds on which the court of appeals could have affirmed. Even if the court of appeals "decided [nothing] more than that the district court did not abuse its

discretion by granting preliminary injunctive relief," as appellees allege (Brief for Appellees at 10), that decision necessarily rested on the court of appeals' conclusion that the ordinance was unconstitutional. If the court of appeals had determined instead that the district court erred in interpreting or applying the law, the court of appeals would have held the district court abused its discretion. Thus the requirement of Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), that jurisdiction under 28 U.S.C. § 1254(2) is properly invoked if a "court of appeals squarely has 'held' that a state statute is unconstitutional on its face or as applied; [and that] jurisdiction does not lie if the decision might rest on other grounds," is met. See id. at 470 n. 12 (citation omitted). Thus the court of appeals' decision was final and plenary review is proper.

If the Court determines instead that the correct standard of review is whether the district court abused its discretion in grant-

ing the preliminary injunction, this appeal still is proper. The district court applied the criteria for granting a preliminary injunction and determined that one criterion, whether the picketers were reasonably likely to succeed on the merits, was met (Jurisdictional Statement at A-14 to A-15). The "merits" of this case consist solely of the question of whether or not the ordinance is constitutional. Because the ordinance is constitutional, the picketers did not have a reasonable likelihood of success on the merits, and the district court abused its discretion in ordering the preliminary injunction. Thus even if, as appellees assert "[t]he only question now before this Court is whether the district court properly granted preliminary injunctive relief" (Brief for Appellees at 11), the Court has appellate jurisdiction over the case.

Finally, the Town requested a trial on the issue of a permanent injunction, but did

so only to protect its rights. The district court's order states that:

[I]f the defendants do not appeal and the court does not receive within sixty days from the filing date of this order a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction, the preliminary injunction issued today will become permanent, and judgment will be entered in favor of the plaintiffs and against the defendants without further notice from the court.

(Jurisdictional Statement at A-23) (emphasis added). Thus in order to preserve its right to appeal, the Town also requested a trial.

II. The Residential Picketing Ordinance is a Legitimate Exercise of the Town's Police Power.

The Tenth Amendment to the Constitution reserves to states and their subdivisions the powers not otherwise delegated to the federal government. Local governments' police power under the Tenth Amendment includes the power to enact ordinances to promote public welfare. See Berman v. Parker, 348 U.S. 26, 33-34 (1954). The Town of Brookfield made the de-

termination that a residential picketing ordinance promoted the public welfare (see Town of Brookfield General Code § 9.17, Jurisdictional Statement at A-26 to A-27). That determination required that the Town balance two constitutionally guaranteed rights: privacy and freedom of speech. The Town attempted to achieve this balance by restricting the least amount of speech while still protecting privacy. Thus the ordinance only prohibits picketing and only in residential areas. Other forms of expressive activity are allowed in residential areas and picketing, plus other forms of expressive activity, are allowed in nonresidential areas.

"The right to communication is not limitless." Carey v. Brown, 447 U.S. 455, 470 (1980). Expressive activity may be limited in a public forum by a narrowly tailored, content-neutral ordinance designed to advance a significant governmental interest, that leaves open ample alternative channels of communication, Perry Education Ass'n v. Perry Local

Educators' Ass'n, 460 U.S. 37, 45 (1983), or in a nonpublic forum by a reasonable ordinance that is not an effort to suppress expression just because public officials oppose the speakers' views, Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985). This Court has allowed local governments to restrict expression in a variety of circumstances. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (regulation to prevent sleeping in tents in Lafayette Park); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting posting of signs on public property); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (rule allowing sale or distribution of any merchandise, including printed material, only from licensed locations); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (statute permitting resident to have his name removed from mailing lists); Cox v. Louisiana, 379 U.S. 559 (1965) (statute prohibiting pick-

eting and parading in or near courthouses); Breard v. City of Alexandria, 341 U.S. 622 (1951) (ordinance regulating door-to-door magazine solicitations at private residences); Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance prohibiting the use of sound trucks emitting "loud and raucous noises"). Even residential picketing is not "beyond the reach of uniform and nondiscriminatory regulation." Carey v. Brown, 447 U.S. at 470 (1980).

Although the Constitution does not explicitly mention the right of privacy, this Court has recognized the existence of that right under the Constitution since perhaps as early 1891. See Roe v. Wade, 410 U.S. 113, 152 (1973), and cases cited therein. The Court has described the right of privacy as a penumbra right derived from the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-855 (1965); it therefore is not one of the lesser constitutional rights.

Residential districts can be seen as sanctuaries for privacy. The late Justice

Douglas, writing for the majority of the Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9 (emphasis added). The case of City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which like Belle Terre was a zoning case, further establishes that residential areas are sanctuaries for privacy. There the Court stated that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Id. at 50 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)). The Court upheld an ordinance that prevented adult theaters from locating within 1000 feet of a residential area, church, park or school, even

though that left only approximately five percent of the land area of the city available for adult theaters, stating that the ordinance was a valid way for the city to preserve the quality of life in the community at large. Id. at 54.

Brookfield's residential property ordinance is a further example of a municipality attempting to preserve a sanctuary of privacy in its residential neighborhoods. While some expressive activity admittedly is curtailed by the ordinance, the ordinance is nevertheless a valid exercise of Brookfield's police power, because it meets the requirements of a constitutional regulation of speech.

III. Not all Streets are Full Public Fora for First Amendment Activities.

There are dicta in a number of cases that all streets are full public fora for First Amendment activities. See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 802 (1985); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460

U.S. 37, 45 (1983). Labelling a forum as "public" leads to application of the Perry standard to determine whether a regulation is a constitutional time, place and manner restriction on speech. The Town respectfully submits that these dicta are unrealistic because streets vary greatly in their characteristics. Some streets, like those in Brookfield, are as narrow as thirty feet and without sidewalks. Other streets are as wide as the major arteries of the interstate highway system, which also are without sidewalks. In between these two extremes are the downtown streets of Skokie, Illinois, and similar streets. Because of streets' different characteristics, applying the Perry standard to all streets is not appropriate.

The character of the property at issue must be considered when determining the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated. . . ." Perry, 460 U.S. at 44. While the Nazis, under color

of the First Amendment, may parade through downtown Skokie, Illinois, see Collin v. Smith, 578 F.2d 1197 (7th Cir.) cert. denied, 439 U.S. 916 (1978), it is a giant leap from that proposition to the proposition that the Village of Skokie is prevented by the First Amendment from prohibiting the Nazis or anyone else from picketing in front of the home of a local leader of the Jewish community to harass him, his family and his neighbors at his residence.

No matter whether a forum is labeled "public" or "nonpublic," First Amendment analysis ultimately must focus upon whether the expressive activity is "basically incompatible" with the forum. See Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). The forum here is a residential neighborhood of single family homes (Jurisdictional Statement at A-6). The streets are thirty feet wide, with no sidewalks (id.). The expressive activity that is proscribed by the ordinance is picketing, generally understood to be standing or

patrolling in front of a particular place. Picketing is incompatible with both the use of Brookfield's residential streets for vehicular traffic and the general character of its residential neighborhoods.

Brookfield's residential streets were designed primarily for vehicular travel. See Wis. Stat. § 340.01(22). Picketing on these narrow streets will impede the purpose for which they exist--vehicular travel. In addition, picketers create a safety hazard, both to themselves and to other pedestrians, as vehicles attempt to use the streets. If cars and buses are parked on the street the danger will be even greater, because of decreased visibility for drivers.

Picketing is more dangerous, and therefore less compatible with the nature of the streets, than various other pedestrian activities. A parade or march would keep moving, rather than remain in front of one residence, so any danger would be more short-lived. In addition, a parade or march would require

advance notice to the Town, so police protection could be planned for and provided. Individual pedestrians also would create less of a danger than a group of picketers or individual picketers. People walking or jogging on the street would move out of the area, rather than remain in one place.

As well as being incompatible with the nature and purpose of the residential streets in Brookfield, picketing also is incompatible with the residential nature of the neighborhood. This Court stated in Grayned that "[t]he initial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 118 (emphasis added). According to Judge Coffey in his dissent in the vacated Schultz v. Frisby Seventh Circuit decision, "[t]he presence of picketers lurking outside one's home, threatening the very peace and tranquility and security that constitutes a most significant part of the right to privacy, can never be

considered as being compatible with the normal activities of a private residential neighborhood." 807 F.2d 1339, 1366 (7th Cir. 1986) (Coffey, J., dissenting) (JA-186 to JA-187). The home has been called the "last citadel of the tired, the weary, and the sick." Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring). A group of picketers, or even a single picket, is not compatible with the private nature of the homes in Brookfield's residential neighborhoods.

IV. The Residential Picketing Ordinance does not Contain an Implied Labor Exception.

This court in Carey v. Brown, 447 U.S. 455 (1980), left open the question of "... whether a statute banning all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." Id. at 459 n. 2. This case squarely presents that question. The district court determined that the Brookfield residential picketing ordinance did not violate the equal protection clause of the Fourteenth Amendment

when it refused to read an implied exception to labor picketing into the ordinance and held the ordinance was content neutral (see Jurisdictional Statement at A-17). Appellees argue that a state statute exempts labor picketing from the ordinance and that the ordinance therefore violates equal protection (Brief for Appellees at 17-26). However, this Court "rarely reviews a construction of state law agreed upon by the two lower federal courts." Virginia v. American Booksellers Ass'n, ___ U.S. ___, 108 S. Ct. 636, 643 (1988); see Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500 (1985), and cases cited therein. The district court did not construe the state labor statute to require that labor picketing be allowed under the Brookfield ordinance, and noted that the legislative history of the ordinance showed a "precisely contrary intent" (Jurisdictional Statement at A-17). The court of appeals affirmed the district court's judgment, albeit without opinion (id. at A-1).

In the event that this Court believes that the state statute applies, it should be noted that the Wisconsin Supreme Court has construed an express labor exception in a residential picketing ordinance as ensuring equal protection in City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971). The court there stated:

The apparent legislative intent is to protect the home or residence as a home and residence, and permit picketing of a place of employment regardless of whether or not it is located in a residential property. Where the householder makes his home or residence a place of employment for someone else, for as long as it is such place of employment, he waives the protection of the ordinance as to disputes related to such fact and place of employment. Where a householder employs a maid or building service workers, in the event of dispute, the only place such employees could exercise the right to picket, that would have any relatedness to the controversy, is where they were employed. Where a homeowner employs a carpenter, painter or electrician to repair or remodel the premises, as to any employment-related dispute, the place of employment is the only possible focus for picket activity. Where an employer lives above the store or tavern, or operates and maintains his business out of his residence, as to his employees in

any labor-related dispute, the place of business is the only focus or target at which picketing could be meaningfully directed. Where the home is, temporarily or permanently a place of employment, to take from those involved in an employment-related or labor dispute the right to picket at the place of their employment would leave them no place to picket such employer. Since there would be no reasonable alternative place available in such dispute as to such employment, the ban on picketing a home-place of employment would very nearly be a ban on picketing the employer at all. We view the exception not as denying, but as assuring, equal protection by limiting the ban on picketing the home to picketing of it as a place of employment whenever it is also that.

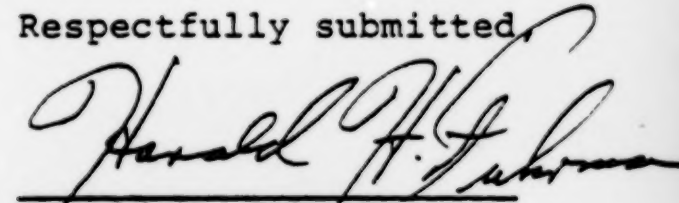
Id. at 413-414, 182 N.W.2d at 538 (emphasis added), contra, Carey v. Brown, 447 U.S. at 468-69. As Justice Rehnquist has stated, "[i]t is far from nonsensical or arbitrary for a legislature to conclude that privacy interests are reduced when the residence is used for these other [nonresidential] purposes." Id. at 483 (Rehnquist, J., dissenting). Appellants respectfully submit that this Court should adopt the rationale of the Wisconsin

Supreme Court as the appropriate construction
of a Wisconsin ordinance.

CONCLUSION

The judgment of the court of appeals
should be reversed.

Respectfully submitted,



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No. 87-168

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

— o —
RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,

Appellees.

— o —
On Appeal from the United States Court
of Appeals for the Seventh Circuit

— o —
**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLANTS**

— o —
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No. 87-168

In The
Supreme Court of the United States
October Term, 1987

RUSSELL FRISBY, *et al.*,
Appellants,
v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLANTS**

INTEREST OF AMICUS

This amicus curiae brief of Pacific Legal Foundation (PLF) is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for appellants and appellees; these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation has extensive experience with the intrusive and oppressive impacts of residential picketing. PLF has represented agricultural employees before the California Agricultural Labor Relations Board, in actions taken as a result of mass labor picketing at these employees' homes. For example labor picketing occurred at Clyde W. Cornell's home in Salinas, California, on Sunday morning, April 29, 1979. Nearly 40 members of the striking United Farm Workers of America marched, screamed, and yelled obscenities in front of Mr. Cornell's home terrifying his family and disrupting the tranquility of the entire neighborhood. Before the demonstration was ended by the police, 13 picketers had been arrested. The administrative and judicial actions taken on behalf of Mr. Cornell by PLF were initiated in the attempt to insure that Mr. Cornell and his family would never again have the privacy and sanctity of their home and neighborhood so flagrantly violated.

PLF strongly believes that municipalities must be permitted to adopt narrowly drawn statutes to protect

their citizens' rights to privacy in their homes. Otherwise frightening occurrences of picketing in residential neighborhoods will continue needlessly.

The lower court's decision to set aside the residential picketing ordinance of Brookfield, Wisconsin, when there is no constitutional need to allow the picketing, sets a dangerous precedent. PLF considers the lower court's decision to be extremely significant as it interferes with citizens' fundamental right to privacy in the home and overrides the state's compelling interest in protecting that right. The lower court failed to recognize this superseding interest in domestic tranquility; yet past Supreme Court decisions as well as federal and state court decisions have recognized and protected the fundamental right to privacy in the home when confronted with uninvited speech.

The state's compelling need to protect both the right to privacy and the right to free speech is undeniable; yet neither right is absolute. When these rights conflict they must be weighed and balanced by the courts. It is the opinion of amicus curiae that the constitutionally protected privacy right in the home is superseding and was not properly considered or weighed by the District Court. If it had, the court would have ruled the right to privacy in the home so compelling as to sustain Brookfield's residential picketing ordinance. PLF, due to its unique perspective and experience concerning the protection of residential privacy interests, believes that it can provide this Court with a more complete argument on the need to balance the important public interest at stake in this litigation.

STATEMENT OF THE CASE

This case arises from the Town of Brookfield, Wisconsin's, attempt to protect its residents, adults and children alike, from having their homes picketed.

Between April 20 and May 20, 1985, demonstrators picketed the home of Dr. Benjamin M. Victoria. Dr. Victoria lives in the Black Forest subdivision of Brookfield, a small residential suburb of Milwaukee. Considerable business and commercial development is clustered along one major highway running through town and the remainder of town is residential like the Black Forest subdivision. The picketing created significant unrest in Brookfield. For the local residents to think that their homes could be invaded by strangers patrolling or posting themselves in front of their homes was alarming. As a result an ordinance was passed which stated "it is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The constitutionality of this ordinance is the subject of this case. The appellees filed a complaint in federal District Court arguing that their free speech rights under the First and Fourteenth Amendments of the United States Constitution were being deprived. The ordinance now comes before the Supreme Court having been invalidated by the District Court, and affirmed by the Circuit Court, as likely to fail the test of a constitutional time, place, and manner regulation of speech.

SUMMARY OF ARGUMENT

The judgment of the Seventh Circuit Court of Appeals should be overturned for the following reasons:

1. The protection of the right of privacy in the home should be assigned superseding importance when evaluating the constitutionality of Brookfield's residential picketing ordinance.
2. Application of the correct test demonstrates that the Brookfield residential picketing ordinance is a constitutional time, place, and manner regulation of speech.

ARGUMENT

I

THE COURT SHOULD ASSIGN SUPERSEDING IMPORTANCE TO THE PROTECTION OF PRIVACY IN THE HOME

"Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974).

Moreover,

"[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public

library . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

These principles demonstrate the totally inappropriate nature of picketing around someone's home. The patterns of a residential neighborhood's normal activity are incompatible with picketing. The scenes are varied but each demands similar attributes—security and privacy from unfriendly intrusions. Picture three or four young girls playing with their dolls, pushing them along the streets in their buggies; picture a young mother walking her newborn child; picture a father and son playing catch in the front yard, or even the neighborhood kids playing a game of baseball on the street in front of their homes. Then erase these pictures from sight, for when a band of picketers enters a neighborhood there is no room for anyone else. Little girls will be hurried inside by their frightened parents. New mothers will seek refuge away from the picketers taking up a menacing watch over some neighbor's home. No kids will be found in the streets because their haven, their last retreat, has been taken over.

Make no mistake, the picketers intend this result for it is more than words they wish to convey—their message is intimidation no matter how peaceful they may superficially appear. Their purpose is to communicate that until their subject repents or recants that he or she and all those around will have to live with constant concern. This result is argued by plaintiffs to be protected by the First Amendment. To the contrary the framers of the

Constitution never intended the right of free speech as a weapon of harassment or intimidation of individuals in the very privacy of their own homes.

Privacy in the home constitutes a compelling state interest which only the state through the exercise of its police power has the capability of ensuring. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Brookfield, Wisconsin, recognized its heavy responsibility and indeed duty. It recognized that picketing around homes is an oppressive, emotionally disturbing form of conduct which deprives a residential area of its feeling of well-being and privacy. Brookfield did the only thing it could responsibly do under these circumstances: it prohibited all picketing before or about homes within its jurisdiction. Nevertheless the District Court struck down Brookfield's attempt to protect its residents and the Circuit Court affirmed, ruling in effect that at all times privacy in the home must be subordinated to the right of picketers to invade the tranquility of the home environment. In the words of the District Court, "[a]n absolute ban . . . against a form of protected speech [residential picketing] cannot be permitted to stand." *Schultz v. Frisby*, 619 F. Supp. 792, 797 (E.D. Wis. 1985).

Yet this Court stated in *United States v. Grace*, 461 U.S. 171, 177 (1983), "[w]e have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" Quoting *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). The District Court's absolutist approach fails to recognize that speech coupled with conduct such as picketing can indeed be limited, and in some circumstances banned altogether as

to a particular location. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 651-52 (1981); *Bakery and Pastry Drivers v. Wohl*, 315 U.S. 769 (1942). It is imperative that the District Court's analysis be corrected.

The state must be permitted to exercise its duty to protect the residential privacy of its citizens, because without safeguarding statutes a citizen can and will be subjected to the true horrors of residential picketing, for its purpose is not just to educate or simply communicate, but to harass, intimidate, and embarrass. The right of privacy in the home is so cherished and fundamental to a free and democratic society that on balance there is no justification to exalt picketing under the guise of free speech to a protected, unassailable status. When weighed against the right to have a safe and private home, the right to picket pales in constitutional importance and can be seen in its true light—not as a tool to express and communicate ideas but as a weapon of injustice.

The right to be free from invasion of privacy encompasses the right to have one's home, family, and personal life protected from disruption. A clear line of case authority demonstrates that the privacy and sanctity of the home are to be given the highest safeguards against intrusive speech in a variety of factual settings.

In *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), this Court upheld the constitutionality of a federal statute which permitted a resident to have his name removed from mailing lists thereby prohibiting mail houses from sending mailings to the resident's home if the subject matter of the mailings was found by the resident

to be sexually offensive. Chief Justice Burger stated in his opinion:

"Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan*, 397 U.S. at 736-37.

In explaining his opinion the Chief Justice continued:

"The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

...

"We therefore categorically reject the argument at a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Rowan*, 397 U.S. at 737-38.

In an earlier case, *Kovacs v. Cooper, supra*, this Court upheld an ordinance prohibiting the use of sound trucks emitting "loud and raucous noises," reasoning that a person in his home or even in the street is particularly helpless to escape interference with his privacy except through protection of the municipality. *Kovacs*, 336 U.S. at 87.

In addition, the Court stated:

“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within the constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.” *Kovacs*, 336 U.S. at 83.

In *Breard v. Alexandria*, 341 U.S. 622, 625-26 (1951), this Court, in upholding a municipal ordinance regulating door-to-door magazine solicitations at private residences, retained this rationale, noting

“that opportunists . . . cannot be permitted to arm themselves with an acceptable principle, such as . . . a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.”

In commenting on the effects of unregulated picketing, Justice Black in his concurring opinion in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), emphasized that the family home should be protected:

“And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desire to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men.

I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.” *Gregory*, 394 U.S. at 125-26.

Many other federal and state decisions also have determined residential picketing to be disruptive of the feelings of well-being and privacy that one is entitled to enjoy in his home and, thus, subject to prohibition or regulation. These cases have held that regulation is not an infringement of the First Amendment right to free speech in that the restriction of picketing and concomitant speech is in furtherance of a legitimate, substantial, and compelling state interest—protection of the right of privacy. See *City of Wauwatosa v. King*, 49 Wis. 2d 38, 182 N.W.2d 530 (1971); *State v. Zanker*, 179 Minn. 355, 356, 299 N.W. 311 (1930); *State v. Perry*, 196 Minn. 481, 482, 265 N.W. 302 (1936); *Pipe Machinery Co. v. De More*, 76 N.E.2d 725, 727 (1947); *Hebrew v. Davis*, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (1962); *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

Picketing is completely incompatible with the home environment. As established by these cases, the right of privacy in the home may be protected from intrusive and disruptive speech through the regulatory efforts of states and municipalities. The District Court, however, failed to assign to Brookfield's residential picketing ordinance the proper constitutional weight, a superseding weight for protecting privacy in the home. It instead assigned to “picketing” a constitutional preeminence found neither in case law nor the Constitution itself.

II

**EVEN IF THE STREETS OF BROOKFIELD'S
BLACK FOREST SUBDIVISION WERE
CONSIDERED A PUBLIC FORUM, BROOKFIELD'S
ORDINANCE BANNING RESIDENTIAL PICKETING
IS A CONSTITUTIONAL TIME, PLACE, AND
MANNER REGULATION OF SPEECH**

The lanes and byways of Brookfield's Black Forest subdivision are only 30 feet wide. They have no lighting and are not bordered by sidewalks. There is no evidence that they have ever been reserved much less used for picketing purposes.¹ Picketing on these narrow lanes would be unsafe and a clear infringement on residential tranquility. Under these circumstances, forbidding residential picketing is constitutionally valid as long as the ordinance is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983). This standard is easily met by Brookfield's ordinance but amicus urges the Court to recognize that Brookfield's ordinance also stands even under much stricter standards. Even if the Black Forest subdivision's streets were wide enough so that picketing did not conflict with safe traffic, and even if there were lighting and sidewalks along the streets, Brookfield's ordinance is constitutional as a reasonable time, place, and manner restriction on speech.

There is no question that the state can impose content-neutral regulations of time, place, and manner on speech

¹ Except for the April and May picketing which precipitated the ordinance.

as long as the regulations serve a legitimate state interest, are narrowly tailored, and leave open ample alternative channels of communication. *Perry*, 460 U.S. at 45. Also beyond question is the character of Brookfield's ordinance. It is not content based because it unequivocally restricts all residential picketing regardless of the message of the picketers. Brookfield's ordinance also meets the test of constitutional validity because it: (1) serves a legitimate state interest, (2) is narrowly tailored to meet that interest, and (3) leaves open ample alternative channels of communication.

**A. Protection of Residential Privacy
Standing Alone Is a Legitimate State Interest**

Brookfield clearly articulated that the interests it wanted to protect were both public safety of those using its streets and the peace, privacy, and security of its citizens when at home. *See* Town of Brookfield General Code § 9.17.

This Court has long held that the state has a legitimate interest in regulating expressive conduct that interferes with the safe or orderly use of public streets. *Cox v. Louisiana*, 379 U.S. 536 (1965). But Brookfield's interest in protecting the privacy of its citizens while at home is alone more than adequate to satisfy the legitimate state interest prong of the *Perry* test. Indeed privacy in the home constitutes a compelling state interest of superseding importance. *See* Argument I, *supra*.

As already recognized by this Court, within the context of one's home, "the individual's right to be left alone

plainly outweighs the First Amendment Rights of an intruder.” *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). There can be no doubt of the legitimate interest Brookfield sought to protect.

**B. The Brookfield Ordinance Is
Narrowly Tailored to Meet Its
Interest in Protecting Residential Privacy**

The District Court erred in determining that the ordinance was not narrowly tailored. In so deciding the lower court suggested that means less restrictive of the picketers’ conduct were available to the town, such as limiting the time of picketing, or the number of picketers, or the season of picketing. *Schultz*, 619 F. Supp. at 797. But the District Court misconstrued the proper test, for a content-neutral regulation is narrowly drawn if it “responds precisely to the substantive problem which legitimately concerns the City.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). See also *United States v. Albertini*, 472 U.S. 675 (1985); *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 89 L. Ed. 2d 29 (1986). The substantive problem Brookfield is attempting to curtail is picketing around its citizens’ homes. Limiting the time or season for picketing, or number of picketers, will not cure the substantive problem. That problem is picketing,² for picketing is at times terrifying and always intimidating and harassing.

² “The verb ‘picket’ is a commonly understood, widely used term describing the conduct of one who patrols an area or stations himself at a place bearing some insignia or sign designed to persuade or protest.” *Simpson v. Municipal Court*, 14 Cal. App.3d 591, 92 Cal. Rptr. 417 (1971). See also *Hughes v. Superior Court of California*, 339 U.S. 460, 464-65 (1950). Many forms of communication, including expressive conduct, fall outside of the recognized, specific conduct described as picketing.

The problem is the presence of even one individual, an unwelcome visitor to your home, who you know is not there for your benefit, but quite the contrary, to protest, harass, frighten, and intimidate.

“‘[T]o those inside . . . the home becomes something less than a home when and while the picketing . . . continue(s) [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.’” *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting (quoting *City of Wauwatosa v. King*, 49 Wis. 2d 398, 411-12, 182 N.W.2d 530, 537 (1971))).

Picketing is a manner of expression which is completely incompatible with the normal activity of a peaceful residential area, an area commonly teeming with communal activity such as busy tots playing, and family members coming and going. The problem faced by Brookfield was the posting of menacing individuals who were strangers to the families in the neighborhood. The *only* way to cure the problem is to prohibit it. That is what Brookfield did, and under *City Council v. Taxpayers for Vincent*, *supra*, such a response is narrowly tailored to serve the legitimate interest in protecting residential privacy.

**C. Brookfield’s Ordinance Left Open
Ample Alternative Channels of
Communication Even Within the
Black Forest Residential Community**

The District Court correctly found that Brookfield’s ordinance allows for ample alternative channels of communication. This finding is supported by the record.

Unfortunately the District Court's overriding belief that "[a]n absolute ban . . . against a form of speech (here residential picketing), cannot be permitted to stand," *Schultz v. Frisby*, 619 F. Supp. 792, 797 (E.D. Wis. 1985), tainted its thinking and decision.

The District Court reached the wrong result but did make some salient observations. When addressing the term "ample alternative channels," the court emphasized that it should not be asked to assess whether alternative channels for plaintiffs' speech must be equally effective, so that plaintiffs are still able "to stir up the . . . family, the family's neighbors, the town . . . and allow plaintiffs to garner as much publicity, as they would by home picketing." *Id.* at 797. If this were the test there would seldom be ample alternative channels because "[p]icketing subject to legal challenge will almost always attract more media attention" than other channels of communication. *Id.* "Thus, if an alternative channel must be ample in the sense that it affords the same publicity to speech as does the challenged channel, the speech which intrudes on people's privacy and is more outrageous (and therefore, unfortunately, more newsworthy) will be . . . more likely to receive the protection of the First Amendment." *Id.* This fortunately is not the standard for "ample alternative channels." Nowhere has this Court ruled that communicators are owed under the First Amendment the privilege of forcing others to receive their message with the same coercive, intimidating force as through picketing.

Plaintiffs herein had more than ample alternative methods to communicate in the Town of Brookfield their displeasure with Dr. Victoria's conduct. They could have

distributed leaflets to the neighbors, they could have marched past the Victorias' home, they could have advertised on the radio or television or in the newspaper, they could have even picketed the public, commercial areas of Brookfield.³ *Id.* at 797. Each of these methods provides plaintiffs access to many listeners including the media to express their concerns. Likewise, and unlike picketing, each of these methods also allows the listeners whom plaintiffs seek to reach, the right to turn off the message at any time. *Rowan; Kovacs*. The constitution demands no more and no less.

CONCLUSION

The right to privacy in one's home is of superseding importance and at times outweighs other constitutional protections. Picketing is incompatible with the normal activities of a neighborhood, and when ample alternative channels for presenting a message are available, it is not the security and privacy of a home that must give way, but the picketing. The Town of Brookfield was faced with this conflict and it struck the constitutionally correct balance. Its ordinance forbidding picketing must be upheld.

³ The ordinance which is attacked not as it is applied but facially prohibits only "picketing," not other ample means of communication within Black Forest itself. (See definition of picketing, *infra* at Footnote No. 2.) Thus a claim that the statute could be overbroad in its application would not stand because "it has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)." *Virginia v. American Booksellers Association*, — U.S. —, 56 U.S.L.W. 4113, 4117 (January 25, 1988).

For these reasons, this Court should set aside the decision of the District Court as affirmed by the Seventh Circuit Court of Appeals.

DATED: February, 1988.

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No. 87-168

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS IN
SUPPORT OF APPELLANT, TOWN OF
BROOKFIELD**

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**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS IN
SUPPORT OF APPELLANT, TOWN OF
BROOKFIELD**

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is filed pursuant to Rule 36 of the Rules of this Court on behalf of the more than 1,900 local governments that are members of the National Institute of Municipal Law Officers (NIMLO). Both parties have consented to the filing of this brief and their letters of consent have been lodged with the Court.

NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by

the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and other titles. The Appellant, Town of Brookfield, is a member of NIMLO.

The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and for the political subdivision of the state, territory, or commonwealth of which they are the authorized legal officer thereof.

The local government attorneys who operate NIMLO are responsible for advising their city governments on the best lawful methods for promoting health and safety within their jurisdictions. These attorneys also represent their governments in litigation resulting from the implementation of municipal regulations, such as the non-picketing ordinance before this Court. The United States Court of Appeals for the Seventh Circuit has held that the Town of Brookfield's ordinance prohibiting picketing before or about a residence or dwelling was unconstitutional.

NIMLO believes that the Brookfield residential non-picketing ordinance challenged in this case is a valid exercise of the town's broad municipal police power. The Seventh Circuit's decision does not properly recognize a municipality's broad power to restrict expressive conduct when it interferes with the public good. If allowed to stand, this decision will severely curtail the ability of local governments to use their police powers to foster and protect the health, safety and welfare of their citizens. Accordingly, NIMLO has a significant interest in the issues raised by this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Appellants.

SUMMARY OF ARGUMENT

Local governments possess the requisite police power to enact ordinances which protect the public, including public safety, health, and welfare (peaceful and quiet enjoyment). The Town of Brookfield ordinance is a valid exercise of that power because it protects the public safety and privacy interests of its residents. The ordinance does not violate the First Amendment in accomplishing its public safety and welfare goals since it is content neutral, is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.

The ordinance is content neutral as it bans all picketing in certain designated areas. It is narrowly tailored to achieve its goal of protecting public safety and welfare concerns because even one picketer would disrupt traffic and tranquility in the neighborhoods.

The U.S. Constitution does not guarantee the right to maximum media coverage of one's views, only the right to express them. Several alternative channels of communication remain open which would not interfere with the interests the ordinance is trying to protect.

Finally, the ordinance is not substantially overbroad as it directly accomplishes its privacy and public safety goals without infringing upon constitutionally protected activities. The ordinance does not operate on a fundamentally mistaken premise. It realistically attempts to regulate conduct that harasses those at home and presents substantial risks to public safety.

ARGUMENT

I. LOCAL GOVERNMENTS MAY REQUIRE THAT PICKETING NOT TAKE PLACE IN RESIDENTIAL AREAS IN ORDER TO ADVANCE PRIVACY AND PUBLIC SAFETY GOALS.

Local governments, by virtue of their police power, may enact ordinances to promote public welfare. See *Berman v. Parker*, 348 U.S. 26, 33-34 (1954). Public welfare is a broad concept which includes "public safety, public health, morality, peace and quiet, [and] law and order." *Id.* at 32-33. An ordinance that advances public welfare but also restricts expressive activities protected by the First Amendment will be upheld if it is a "reasonable time, place, or manner restriction." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), the Court determined that restrictions on expression meet the reasonable time, place or manner standard if they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."¹

¹This Court has also used the framework set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) for determining whether a restriction on expression is valid under the First Amendment. According to *O'Brien*,

[a] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

Brookfield's ordinance promotes residential privacy, tranquility and public safety by prohibiting picketing at a dwelling or residence. This ordinance is clearly content-neutral and serves significant governmental interests.

The Brookfield ordinance makes it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Brookfield, Wis., Gen. Code § 9.17 (1985). Ordinances that have been struck down for discriminating against picketers based on the content of their expression have afforded preferential treatment to expression on a particular topic.² The Brookfield ordinance does not exempt any type of residential picketing from its prohibition. It is, therefore, content-neutral.

By removing picketing activities from residential areas, the Brookfield ordinance seeks to promote the "well-being, tranquility, and privacy" of those at home. Brookfield, Wis., Gen. Code § 9.17 (1985). It

greater than is essential to the furtherance of that interest.

Id. at 377.

In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), the Court determined that the *O'Brien* framework was "little, if any, different from the standard applied to time, place or manner restrictions." (footnote omitted).

²In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) the Court invalidated an ordinance which exempted peaceful labor picketing from its ban on picketing at a school. In *Carey v. Brown*, 447 U.S. 455 (1980), the Court invalidated an ordinance for exempting labor picketing from its ban on residential picketing. On the face of these ordinances, preferential treatment was given to labor disputes.

also eliminates an activity that "obstructs and interferes with the free use of public sidewalks and public ways of travel." *Id.* It is well established that a government has a significant interest in protecting public safety, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981), as well as in protecting the tranquility of the home, *Carey v. Brown*, 447 U.S. 455, 471 (1980). That the Brookfield ordinance serves significant governmental interests is not in question.

Amicus submits that a residential ban on picketing is narrowly tailored to serve these significant governmental interests and leaves open alternative channels of communication.

A. AN ORDINANCE RESTRICTING PICKETING AT RESIDENCES IS NARROWLY TAILORED TO SERVE SIGNIFICANT GOVERNMENTAL INTERESTS.

This Court requires that content neutral time, place, or manner restrictions be narrowly tailored to serve significant governmental interests. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)

The *Frisby* trial court determined that Brookfield's ordinance was not a narrowly tailored manner of advancing privacy and safety interests. *Schultz v. Frisby* 619 F.Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). The court said that "[o]ne can imagine neutral time, place, and manner regulations short of a ban on residential picketing, which would go a long way toward the Town's safety and domestic privacy goals . . . An absolute ban, however, against a form of protected speech cannot be permitted to stand." *Id.* (emphasis added).

On several occasions this Court has considered the meaning of "narrowly tailored," and has never invalidated an otherwise constitutional time, place and manner regulation merely because it is possible to "imagine" less restrictive alternatives to achieve a given objective. Amicus submits, therefore, that the decision of the trial court was the result of the court's misapplication of the "narrowly tailored" prong of the time, place or manner test.

In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court considered whether an ordinance which banned the posting of signs on public property was narrowly tailored to serve the City's interest in reducing blight. The Court of Appeals had invalidated the ordinance because, in its opinion, less restrictive alternatives were available to achieve the City's interests. *Taxpayers for Vincent v. Members of the City Council*, 682 F.2d 847,852 (9th Cir. 1982), *rev'd*, 466 U.S. 789 (1984). The court stated, "Instead of a general ban, the City might regulate the size, design, and construction of the posters . . . institute clean up or removal requirements . . . or provide more stringent regulations for the areas of the City more in need of protection." *Id.* at 852-53. This Court reversed, and did not consider less restrictive alternatives when determining whether the ordinance, as applied, was a narrowly tailored time, place and manner restriction on expression.³ 466 U.S. at 808-10. The

³The Court implied that a "least drastic means" analysis is only appropriate when reviewing a facial challenge based on overbreadth. 466 U.S. at 801.

correct inquiry, this Court determined is, "whether the scope of the restriction on appellee's expressive activity is *substantially broader than necessary* to [serve] the City's [legitimate governmental interest]." 466 U.S. at 808 (emphasis added).

In *United States v. Albertini*, 472 U.S. 675 (1985), the Court again emphasized that a government entity has a degree of leeway in determining reasonable restrictions on speech under the First Amendment. Respondent had received a letter barring him from the Hickam military base and was subsequently convicted of violating a statute prohibiting those who had received such letters from entering a military base. Respondent asserted that the statute violated the First Amendment because its restriction on speech was greater than what was essential to further the government's interest in security. The Court found

that barring respondent from Hickam was not "essential" in any absolute sense to the security at the military base. The military presumably could have provided him with a military police chaperone during the open house. This observation, however, provides an answer to the wrong question by focusing on whether there were conceivable alternatives to enforcing the bar letter in this case. The First Amendment does not bar application of a neutral regulation... merely because... there is some imaginable alternative that might be less burdensome on speech... Instead, an incidental burden on speech is no greater than is essential... so long as the neutral regulation promotes a substantial government interest *that would*

be achieved less effectively absent the regulation.

472 U.S. at 688-89 (emphasis added).

A regulation is, therefore, narrowly tailored if it is not "substantially broader than necessary," *Vincent*, 466 U.S. at 808, or "promotes a substantial government interest that would be achieved less effectively absent the regulation," *Albertini*, 472 U.S. at 689. The Brookfield ordinance satisfies both the *Vincent* and the *Albertini* tests. Moreover, although this Court has not required that a regulation be the least restrictive way to achieve significant governmental interests, Brookfield's ordinance also satisfies that standard.

The *Frisby* trial court said that the Town's safety concerns could be achieved "by limiting the time of picketing and the number of persons who may picket at one time." *Schultz v. Frisby*, 619 F.Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). This reasoning does not take into account the physical layout of the Town's subdivisions or the limited number of traffic safety officers which are available.

Brookfield is a residential suburb with eight police officers and a police chief. *Id.* at 793. It has a subdivision of residential homes with streets that are only thirty feet wide and have no sidewalks, curbs or street lights. *Id.* at 793-94.

In the present case, picketers carried signs and shouted, *Id.* at 795, while standing on streets just wide enough to accommodate one car in each direction, J.A. 49-50. This type of behavior is inherently distracting and poses a significant risk to public safe-

ty. Indeed, the trial court agreed that "[t]he safety of picketers and passers-by is a serious concern where streets are narrow, there are no sidewalks, and traffic may be heavy." *Id.* at 796.

Because picketing increases the risk of traffic hazards, it is similar in this respect to billboards, which are "real and substantial hazards to traffic safety." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981). In *Metromedia* this Court considered whether an ordinance banning most offsite billboards was constitutional. Although the ordinance was ultimately declared invalid for favoring commercial speech over noncommercial speech, the Court said that "we cannot conclude that the City has drawn an ordinance broader than is necessary to meet its interest." 453 U.S. at 512.

Pickers pose a greater threat to public safety than do billboards. They move about, approach those passing by, carry signs and shout their messages, while billboards are stationary. In light of the distracting actions of picketers, the narrow streets, lack of sidewalks, and small police force available to adequately regulate traffic problems, limiting the time and number of picketers would not eliminate the risk to public safety. Brookfield's ordinance restricting picketing to areas other than "before or about" residential dwellings, Brookfield, Wis., Gen. Code § 9.17 (1985), is no broader than necessary to protect public safety.

Another stated purpose of the ordinance is to eliminate the emotional disturbance, distress and harassment caused by picketers to those in their homes. It is well established that a government's "in-

terest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). In *Carey*, the Court determined that, although a local government may not discriminate against picketers based on the content of their expression, "[w]e are not to be understood to imply . . . that residential picketing is beyond the reach of uniform and nondiscriminatory regulation." 447 U.S. at 470. "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.'" *Carey*, 447 U.S. at 471, quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969).

The *Frisby* trial court determined that Brookfield's interest in protecting its residents from emotional disturbance, distress and harassment while in their homes or in process of ingress thereto or egress therefrom, could be adequately served by limiting picketers to certain hours and by limiting the number of picketers who may congregate at any one time. *Schultz v. Frisby*, 619 F. Supp. at 797. The trial court has not considered the disturbing effect that even a restricted number of persons picketing at limited times would have on those captive in their homes. In the present case, the picketers carried signs with emotionally charged slogans and sang and cheered other slogans that made uncharitable references to the father of the family being picketed. *Id.* at 795. Adults and children living in the subdivision found the pick-

eters' activities to be objectionable and/or frightening. (J.A. 50-53). As a result, one neighbor felt compelled to reroute her trips to avoid the picketers, J.A. 76, while a child who had been frightened by the picketers refused to go to destinations near the picketing for a week and a half, J.A. 82-83. Another neighbor was disturbed by the picketers' comments while at her home. (J.A. 58-59). The police subsequently received numerous complaints and reports from the community. (J.A. 50-53). Limiting the hours of picketing and the number of picketers might lessen the harassment and emotional disturbance that such activities inflict upon the residents of the community. This, however, is not sufficient. Residents living in the community have the right to be let alone in the privacy of their homes. Nothing short of a total prohibition of residential picketing can adequately accomplish this goal.

A total ban of expression in a particular place has been upheld as a reasonable time, place or manner restriction. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). In *Vincent*, the Court upheld an ordinance which totally banned the posting of signs on public property. It held that "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. The Court went on to say that "the substantive evil — visual blight — is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810.

The harm caused by picketing is not an incidental by-product of the picketing. It is the act of picketing itself that adversely impacts the tranquility of resi-

ential areas. The tactics employed by the picketers in the present case were calculated to harass the picketed family and their friends and neighbors. This type of disturbance is the very problem that the Town of Brookfield is seeking to avoid. The presence of even one picketer engaged in this type of intrusive behavior would disturb the peace and tranquility of home dwellers. Thus, the Town's ordinance, as with the ordinance upheld in *Vincent*, does "no more than eliminate the exact source of evil it sought to remedy." 466 U.S. at 808.

B. AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION REMAIN OPEN WITH A BAN ON RESIDENTIAL PICKETING.

It has long been recognized by this Court that it "is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949). The Town of Brookfield has determined that residential picketing has as its object the harassment of residents "and without resort to such practice full opportunity exists . . . for the exercise of freedom of speech and other constitutional rights." Brookfield, Wis., Gen. Code § 9.17 (1985). Indeed, Appellees have not argued that easy alternative means of publicity are unavailable to them. The basis of Appellees' objection to the ordinance is that other available avenues of communication might not enable them to receive as extensive media coverage and would, therefore, not be the easiest and most effective method of reaching the greatest audience.

This Court has rejected the notion that those wishing to speak are entitled to use the easiest and most effective way to reach the greatest number of people. See *Kovacs v. Cooper*, 336 U.S. at 88-89. Local governments may prohibit intrusions into the home that a home dweller is incapable of avoiding. In *Kovacs*, the Court upheld a municipal ordinance which prohibited trucks from blaring amplified messages throughout the municipality. The Court weighed the need for this particular manner of expression against the loss of tranquility that the activity inflicted upon those in their homes. *Id.* at 86-87. It determined that although "more people may be more easily and cheaply reached by [this expressive activity]" this could not justify the resulting intrusion into a home dweller's sanctuary. *Id.* at 87-89. The Court stated other forums of communication were available which do not have this disruptive effect. *Id.* at 89.

Here, too, other methods of communication are available for the picketers to effectively spread their message in Brookfield's residential areas. As the *Frisby* trial court observed, the picketers "may distribute leaflets in the . . . neighborhood, (citing *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943)), they may march past the . . . home [they seek to picket] (citing *Gregory v. Chicago*, 394 U.S. 111 (1969)); and, of course, they may picket other more public sites." *Schultz v. Frisby*, 619 F. Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). Not mentioned by the trial court is the opportunity for the picketers to promote their views over the telephone, through door-to-door appeals or through the mail. All of these alternatives are currently available to the picketers and would not significant-

ly, if at all, increase their expenses. Brookfield's ordinance, therefore, satisfies the last prong of the time, place, or manner test and should be upheld under the First Amendment.

II. AN ORDINANCE BANNING PICKETING AT RESIDENTIAL DWELLINGS IS NOT SUBSTANTIALLY OVERBROAD BECAUSE IT DIRECTLY ACCOMPLISHES PRIVACY AND SAFETY GOALS WITHOUT INFRINGING UPON CONSTITUTIONALLY PROTECTED ACTIVITIES.

Appellees have suggested that regardless of whether Brookfield's ordinance may constitutionally be applied to them, it is facially overbroad and must be invalidated.

This Court has indicated that invalidating an ordinance on facial overbreadth grounds is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When an ordinance regulates activities involving expression plus conduct, its overbreadth "must not only be real but substantial as well, judged in relation to the [ordinance]'s plainly legitimate sweep." *Id.* at 615.

An ordinance is not "substantially" overbroad merely because one might be able to conceive of situations where it infringes upon constitutionally protected expression without contributing to the general welfare of those residing in a municipality. See *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, this Court upheld a statute prohibiting persons from promoting sexual performances by children despite the existence of constitutionally protected activities that would be prohibited. The Court acknowledged

that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the [statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguable impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

458 U.S. at 773.

Here, Brookfield's ordinance is limited to residential areas. Because of the significant governmental interest in protecting public safety and the peace and tranquility of those in their homes, the legitimate sweep of the ordinance encompasses most, if not all, residential picketing. If any impermissible applications of the ordinance exist, they pale in comparison to the ordinance's plainly legitimate reach.

Generally, an ordinance will not be invalidated on substantial overbreadth grounds unless it prohibits a substantial amount of conduct which does not interfere with a legitimate goal of government. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984). In *Munson*, a statute which imposed a twenty five percent limit on charitable fund raising expenses was struck down as being facially overbroad. According to the Court the statute's overbreadth was substantial because the statute was based "on a fundamentally mistaken premise that high solicitation costs are an accurate

measure of fraud. That the statute in some of its applications actually prevent[ed] the misdirection of funds from the organization's purported charitable goal [was] little more than fortuitous." 467 U.S. at 966-67.

The Brookfield ordinance does not operate on a "fundamentally mistaken premise." It was enacted based on the premise that residential picketing harasses those at home and presents substantial risks to public safety. Brookfield, Wis., Gen. Code §9.17 (1985). It is not "fortuitous" that this ordinance eliminates these problems. The act of picketing before or about residences creates these problems; the ordinance eliminates them.

Because the sweep of the Brookfield ordinance does not encompass a substantial number of impermissible applications, it should not be invalidated on overbreadth grounds.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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No. 87-168

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal From the United States Court
of Appeals for the Seventh Circuit

**BRIEF OF THE NATIONAL LEAGUE OF CITIES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS, AND
NATIONAL ASSOCIATION OF COUNTIES
AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

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Supreme Court, U.S.
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QUESTION PRESENTED

Whether a content-neutral ordinance restricting picketing upon property immediately adjacent to private homes in a residential neighborhood is valid under the First Amendment.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-168

RUSSELL FRISBY, *et al.*,
v. *Appellants*,
SANDRA C. SCHULTZ, *et al.*,
Appellees.

**On Appeal From the United States Court
of Appeals for the Seventh Circuit**

**BRIEF OF THE NATIONAL LEAGUE OF CITIES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS, AND
NATIONAL ASSOCIATION OF COUNTIES
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case presents the question whether the First Amendment precludes a small residential suburb's effort to prohibit picketing in areas immediately adjacent to homes to preserve for its citizens the domestic tranquility they cherish and to protect public safety and convenience. The Town of Brookfield, a "bedroom" suburb of the City of Milwaukee, adopted an ordinance prohibiting picketing "before or about the residence or

dwelling of any individual." J.S. App. A-8. The ordinance was passed in reaction to complaints about group picketing in front of the family home of a physician who performed abortions at facilities in Appleton and Milwaukee. The declared purposes of the ordinance include "protection and preservation of the home"; the "well-being, tranquility, and privacy" of the neighborhood; and the avoidance of "obstruct[ion] and interfere[nce] with the free use of public sidewalks and public ways of travel." *Ibid.* The district court enjoined enforcement of the ordinance, and the Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed by an equally divided court.

Amici's principal concern relates to the district court's broad assumption that every street, regardless of size, location, or character, is a "public forum" for the exercise of all forms of free speech. *Amici* submit that in determining the extent of permissible regulation of speech-related conduct on streets, the character of the streets should be weighed in the balance together with the kind of activity that is restricted.

Amici are also concerned with the district court's narrow view of the Town's authority to preserve the quality of life of its residents. This Court has recognized the strong interest of state and local governments in preserving the quality of community life (*see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)), and the tranquility of citizens in their homes (*see Carey v. Brown*, 447 U.S. 455, 470 (1980); *id.* at 477 (Rehnquist, J., dissenting)). Brookfield's limited action aimed at disruptive conduct within a particular area should not be invalidated simply because the ordinance may have some minimal impact on the exercise of free speech. Such a rationale would have been grounds to invalidate many, if not all, of the restrictions on picketing and other expressive activity upheld by this Court.

The Court's decision in this case will reach matters of fundamental concern to *amici* and their members. The claim may always be made that restrictions on picketing will limit free speech; but in appropriate contexts those restrictions are upheld nevertheless. Because of the importance of these issues, *amici* submit this brief to assist the Court in its resolution of the case.¹

STATEMENT OF THE CASE

This action was brought under 42 U.S.C. 1983, seeking declaratory and injunctive relief against the alleged deprivation of appellees' First and Fourteenth Amendment rights by an ordinance of the Town of Brookfield, Wisconsin, that prohibits "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." J.S. App. A-8.

Brookfield is a small suburb of Milwaukee, Wisconsin. The Town covers an area of about five-and-a-half square miles and has a population of about 4,300. *Id.* at A-6; J.A. 49. Except for State Highway 18, a commercial thoroughfare, the Town is residential. J.A. 49. Dr. Benjamin Victoria and his family live in a home in a residential subdivision zoned exclusively for single-family residences. J.S. App. A-5 to A-6. The streets are thirty feet wide, although they become partially obstructed in the winter by snowbanks. *Id.* at A-6. There are no sidewalks, curbs, gutters, or street lights. *Ibid.*

The appellees challenging this ordinance are members of the Milwaukee Coalition for Life, an anti-abortion activist group. J.A. 33-35. Between April 20 and May 20, 1985, the Coalition sponsored six picket lines in front of the Victoria family residence to publicize and protest the

¹ Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

fact that Dr. Victoria, who does not practice medicine in Brookfield, performed abortions at clinics in Appleton and Milwaukee. J.S. App. A-5 to A-6. The number of pickets ranged from eleven to more than forty. *Id.* at A-6. They carried signs such as "Stop Abortion Now," "Aborted Babies Sold For 'Cosmetics,'" and "Abortion Is Legal Murder," and shouted slogans like "Dr. Victoria, you're a killer." J.S. App. A-10 to A-12; J.A. 89-92. Picketers talked with passersby and frightened at least one child by the statement that a man who lived up the road killed babies. J.S. App. A-11 to A-12. On occasion, they blocked Victoria family members' entrance to and exit from their home. *Id.* at A-11. Appellees claim that the First Amendment deprives the Town of the power to prevent this picketing.

The Town ordinance declares "that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy"; "that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists . . . for the exercise of freedom of speech and other constitutional rights; . . ." *Id.* at A-8.

The United States District Court for the Eastern District of Wisconsin granted appellees' motion for a preliminary injunction against enforcement of the ordinance. A panel of the Court of Appeals for the Seventh Circuit affirmed, 2 to 1. After rehearing *en banc*, the Court of Appeals divided equally to affirm, without opinion, the judgment of the district court.

SUMMARY OF ARGUMENT

In *Carey v. Brown*, 447 U.S. 455, 459 n.2 (1980), this Court expressly left open the question "whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." In that case, the Court struck down under the Equal Protection Clause an Illinois statute prohibiting picketing of residences or dwellings, but exempting labor picketing. The Court, however, explicitly cautioned that "[w]e are not to be understood to imply . . . that residential picketing is beyond the reach of uniform and non-discriminatory regulation. For the right to communicate is not limitless." *Id.* at 470. Indeed, the Court continued, "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Id.* at 471. This case squarely presents the issue whether a content-neutral ordinance restricting picketing upon property immediately adjacent to private homes in a residential area is valid under the First Amendment.

I. The Brookfield ordinance should be upheld because it is a content-neutral, reasonable restriction upon speech-related conduct, given the character and purpose of the limited zone within which the restriction applies. Although it may be helpful to the analysis in some cases to determine, as a threshold matter, whether property subject to a limitation upon expressive activity is a "public forum" or a "non-public forum," a number of decisions of this Court indicate that such categorization is not always required. Ultimately, First Amendment analysis depends not upon the label assigned to the property, but rather upon the degree to which the expressive activity at issue is "basically incompatible" with the place in which it is carried out. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). This inquiry is essentially the same, whether the forum is "public" or "non-public."

Such an analysis of the facts of this case reveals that picketing is indeed "basically incompatible" with the character of the residential streets of Brookfield. The ordinance is therefore a reasonable limitation upon expressive activity consistent with the First Amendment. The Court's determination whether residential streets are a "non-public forum" is less important in reaching this conclusion than a careful inquiry into the fit between the characteristics of the forum and the expressive activity involved in this case.

The reasonableness of Brookfield's picketing ordinance is established by the significant governmental interests directly advanced by its enforcement. Group picketing upon the narrow residential streets of Brookfield not only is inherently disruptive of residential tranquility, and inherently coercive and intimidating, but also poses significant physical hazards to those using Brookfield's residential streets. These streets simply are not designed or intended to facilitate regular massing of even a handful of individuals for protest purposes. Brookfield may reserve these streets for their intended use (*see Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)) and prohibit group picketing, which necessarily undermines residential tranquility and privacy, as well as public safety and convenience.

II. Even if the Court concludes that Brookfield's residential streets constitute a traditional public forum, the ordinance is a permissible regulation of the place and manner of expressive activity. *See Perry Education Ass'n*, 460 U.S. at 45. The ordinance is content-neutral, making absolutely no distinction with respect to the subject matter or viewpoint of the picketing. The ordinance is narrowly tailored to the particular type of expressive activity posing a danger to the tranquility of the neighborhood, the privacy of its citizens, and the public safety concerns of the Town. Appellees have ample alternative means of expression to make their views known. The

ordinance does not prohibit picketing in Brookfield other than "before or about" residences, and, of course, has no application to picketing at Dr. Victoria's clinics because they are not located in Brookfield. Neither does the ordinance prohibit appellees from marching through Brookfield; nor does it affect neighborhood leafletting and solicitations, meetings and rallies in parks and homes, or the use of the mail, telephone, radio, television, and newspapers. Finally, the ordinance may be compared in its effect to zoning restrictions designed to preserve the character of a neighborhood, which have been upheld by this Court even when they limit the location of activity protected by the First Amendment. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

I. A CONTENT-NEUTRAL ORDINANCE RESTRICTING PICKETING UPON PROPERTY IMMEDIATELY ADJACENT TO PRIVATE HOMES IN RESIDENTIAL AREAS IS REASONABLE IN LIGHT OF THE CHARACTER AND PURPOSE OF SUCH PROPERTY.

A. Property Immediately Adjacent To Private Homes In Residential Areas Is Properly Subject To Neutral And Reasonable Restrictions Upon Speech-Related Conduct.

This case concerns the power of a local community to prohibit picketing "before or about the residence or dwelling of any individual." J.S. App. A-8. The extent to which expressive activity may be restricted upon such property depends upon an evaluation of its particular character and purpose. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). As this Court observed in

² Since *Perry Education Ass'n*, First Amendment cases raising questions of access to public property have tended to evaluate first

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (emphasis added) (citation and footnote omitted):

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is *basically incompatible* with the normal activity of a particular place at a particular time.

See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) ("the nature of the forum and the

the character and purpose of the property at issue to determine whether it is a "public forum" or a "non-public forum." That determination results in the application of different standards of review, either a heightened scrutiny or a reasonableness standard, to decide whether the restriction upon expressive activity violates the First Amendment. Compare *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), with *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). It would seem, however, that although labeling particular property "public" or "non-public" at the outset may be analytically helpful in some cases, First Amendment analysis ultimately must focus upon whether the expressive activity restricted is "basically incompatible" with the forum, public or otherwise. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Indeed, it may be that forcing all types of public property into boxes labeled "public forum" or "non-public forum" is unnecessary and obscures the analysis whether any particular restriction upon expressive activity is warranted. See, e.g., *Taxpayers for Vincent*, 466 U.S. at 815 n.32 (questioning utility of public forum analysis in certain cases).

The words "public" and "non-public" may, in effect, do no more than express summarily the Court's conclusion regarding the suitability of a particular forum for particular expressive activity. Thus, *amici* submit that these categories should not be transformed into outcome-determinative molds that foreclose a thorough analysis of the fit between the particular forum and the form of expression at issue. The analysis in this part of the brief, while urging that Brookfield's residential streets are a "non-public" forum, also suggests that the Court may uphold the challenged ordinance without engaging in a lengthy preliminary inquiry to that effect.

conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question"); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) ("consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved").

The compatibility of a particular form of expression with a particular location is "the crucial question" in First Amendment analysis (*Grayned*, 408 U.S. at 116) because the First Amendment provides no blanket privilege for all forms of expression in all locations. "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 799 (1985). "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Thus, while the government's power to limit expressive activity is narrowly circumscribed when "a principal purpose of [the property] is the free exchange of ideas" (*Cornelius*, 473 U.S. at 800), other types of public property may be treated differently:

Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Perry Education Ass'n, 460 U.S. at 46. In sum, the *Perry*, *Grayned*, *Lehman*, and *Heffron* decisions require a particularized examination of the customary or offi-

cially designated characteristics of the specific forum at issue to determine whether a particular restriction upon expressive activity may be deemed reasonable.

The Brookfield ordinance at issue in this case applies only to property immediately adjacent to private homes in a residential area. The streets of Brookfield are within a subdivision zoned exclusively for single-family residences. The road surfaces are approximately 30 feet wide (although not all usable during the winter); and there are no sidewalks, curbs, gutters, or street lights. J.S. App. A-6. There is not a scintilla of evidence to indicate that these streets traditionally have been used or considered as places for public gatherings and protests. Given the character of the streets, it would strain credulity to assert that they were designed, built, or designated by Brookfield as a public forum for communication. These residential streets provide access to single-family dwellings; they are not gathering spots for public debate.

The fact that streets in other places under other circumstances may be considered traditional public forums for the free exchange of ideas does not mean that streets in the residential subdivisions of Brookfield must be similarly classified.³ As Justice Frankfurter wrote:

Where does the speaking which is regulated take place? Not only the general classifications—streets, parks, private buildings—are relevant. The location and size of a park; its customary use for the recreational, esthetic and contemplative needs of a community; the facilities, other than a park or street corner, readily available in a community for airing views, are all pertinent considerations in assessing the limitations [of] the Fourteenth Amendment

³ Indeed, some courts have found that residential streets are not public forums. See, e.g., *Pursley v. City of Fayetteville*, 628 F. Supp. 676 (W.D. Ark. 1986); see also *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), cert. denied, 421 U.S. 971 (1975).

Niemotko v. Maryland, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring). Streets have different characteristics and purposes, just as parks and buildings do. This Court has on occasion referred to “streets” and “parks” as examples of traditional public forums (e.g., *Hague v. CIO*, 307 U.S. 496, 515 (1939)), but a street or park is not a public forum simply because it is a street or park. If it is a public forum, it is because of its use or suitability for open speech and debate. The streets around Madison Square Garden and those around Brookfield’s homes do not share similar characteristics pertinent to their status as public forums; they must be evaluated as forums for expression according to their particular character and purpose, like all other public property.⁴

This Court has declared that “[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.” *Cornelius*, 473 U.S. at 803 (citations omitted) (Combined Federal Campaign charity drive not a public forum). See also *Perry Education Ass’n*, 460 U.S. at 48 (school district’s internal mail system not a public forum); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (mili-

⁴ See, e.g., *Grayned v. City of Rockford*, 408 U.S. at 120 n.45:

Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

See also *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (applying, in a First Amendment context, the rationale for regulating a nuisance: A “‘nuisance may be merely the right thing in the wrong place,—like a pig in the parlor instead of the barnyard.’ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [(1926)].”).

tary reservation not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. at 304 (advertising space on city buses not a public forum); *Adderly v. Florida*, 385 U.S. 39, 48 (1966) (jailhouse grounds not a public forum). The Town of Brookfield clearly intended that its residential streets should not be public forums (see declaration accompanying ordinance, J.S. App. A-8), and the very nature of those streets plainly indicates that picketing would be inconsistent with their character and purpose. Accordingly, amici submit that the residential streets at issue in this case are not a public forum and are properly subject to neutral, reasonable limitations upon speech-related conduct.

B. Brookfield Reasonably Determined That Property Immediately Adjacent To Private Homes In Residential Areas Should Be Protected From Picketing.

"The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. The prohibition of picketing upon property immediately adjacent to private homes in residential areas is reasonable in light of the interests in domestic tranquility, privacy, public safety, and convenience that it serves. A reasonable restriction "need not be the most reasonable or the only reasonable restriction." *Id.* at 808. In particular, reasonableness does not depend on "a finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum." *Ibid.*

Brookfield's picketing ordinance directly furthers residential tranquility and privacy, an interest that "is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).⁵

⁵ See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) ("The police power . . . is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and

The First Amendment has never been interpreted to preclude enforcement of reasonable, content-neutral limitations upon speech-related conduct that disturbs zones where peace and tranquility are important. No one would question under the First Amendment the police power of the State to restrict expressive activity in bird sanctuaries or zoological parks where such activity disrupts the tranquility of the birds and animals in their habitats. Amici respectfully suggest that the residents of Brookfield are entitled to enforce similar protections in their residential neighborhoods.

The picketing in this case illustrates the type of behavior properly proscribable in the interests of residential tranquility and privacy. The picketers, sometimes numbering more than 40 persons, massed repeatedly in front of Dr. Victoria's family home. J.S. App. A-5 to A-6. Cars and buses filled with picketers arrived in the neighborhood, harassing, obstructing, and intimidating the doctor's wife and children and their neighbors with picket signs and taunts. J.S. App. A-10 to A-12; J.A. 42, 68-72. At least one neighborhood child was so frightened after being told that a "baby killer lived nearby" that he would not leave his grandparent's home for the remainder of the day. J.S. App. A-12. Surely it was reasonable for Brookfield residents to find that the repeated intrusions of strangers patrolling in this manner in front of their homes for hours on end disrupted the tranquility of their neighborhood and deprived them of their privacy.

clean air make the area a sanctuary for people"); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("[N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their function . . .").

In addition to serving Brookfield's substantial interest in the tranquility and privacy of its residential neighborhood, the picketing ordinance also helps ensure the safety and convenience of those who use Brookfield's residential streets. As described above, the streets were not designed or intended to accommodate regular massing of even a handful of individuals for protest purposes; there are no curbs, sidewalks, or street lights to facilitate any pedestrian traffic. The streets' design and construction indicate that their purpose is simply to accommodate the residents' automobile transportation to and from their homes.

The physical character of Brookfield's residential streets justifies prohibiting picketing thereon to protect the safety of those using the streets. Because of the absence of curbs and sidewalks, nothing delineates where cars may travel and picketers patrol, thus distracting drivers and endangering picketers. Picketing necessarily disrupts and impedes automobile traffic on narrow roads. It forces pedestrians, especially young children and senior citizens who are more likely to be walking than traveling by automobile, to walk farther out onto the road to get around the crowd of picketers and may make them reluctant to use the streets of their neighborhood. These dangers are increased when the cars and buses that bring picketers into the neighborhood are parked on the streets; at night, because of the absence of street lighting; and during winter months, when snowbanks along the streets make them even narrower. See J.S. App. A-6; J.A. 68-72. Indeed, the very fact that picketers apparently must stand in the street itself in order to avoid trespassing upon private property demonstrates as clearly as any other fact the reasonableness of the Brookfield ordinance.

The power of local governments to control streets for public safety purposes is very broad:

The control of travel on the streets is a clear example of governmental responsibility to ensure this necessary order. A restriction in that relation, designed

to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection.

Cox v. Louisiana, 379 U.S. 536, 554 (1965). See also *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("the authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend"). Of course, Brookfield could prosecute individuals who are caught obstructing streets, but the Town may also take account of likely safety hazards posed by picketing on residential streets and prohibit it before a tragedy occurs.⁶ The numerous public safety and convenience problems created by groups of picketers assembled on the narrow residential streets of Brookfield confirm that prohibiting picketing there is both reasonable and well within the Town's police power.

This Court has repeatedly upheld prohibitions upon particular expressive activity, including picketing, where the activity interferes with public interests no more compelling than the ones at stake here.⁷ For example, in

⁶ For example, in *United States Labor Party v. Oremus*, 619 F.2d 683, 686 (7th Cir. 1980), the court upheld an Illinois statute prohibiting persons from standing on a "highway for the purpose of soliciting employment, business or contributions from the occupant of any vehicle." The court noted the argument that "the [government] could serve [its] interest through a less restrictive means by punishing only those who actually disrupt traffic or engage in unsafe behavior," but held that "[t]he State need not wait for personal injuries." *Id.* at 688 n.4.

⁷ The Court has recognized that certain interests asserted by the federal government, for example containing labor discord, will take precedence over an asserted right to picket. See, e.g., *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S.

Cox v. Louisiana, 379 U.S. 559 (1965), the Court sustained a statute prohibiting picketing and parading in or near courthouses. The Court observed that "a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." *Id.* at 562. The Court then added:

The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited.

Id. at 563.⁸ Protecting the judicial system from the real or perceived pressures that picketing might create is surely a substantial governmental interest. Protection of privacy and domestic tranquility around the homes of our citizens is no less significant.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court upheld a Los Angeles ordinance prohibiting posting of any signs, including political signs, on public property, observing that cities "have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expres-

607, 616 (1980) (plurality opinion of Powell, J.); *id.* at 616-18 (Blackmun, J., concurring); *id.* at 618-19 (Stevens, J., concurring). Cf. *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom.*, *Boos v. Barry*, 107 S.Ct. 1282 (1987) (foreign policy considerations support statute prohibiting display of signs bringing foreign government into disrepute and congregating within 500 feet of embassy). *Carey v. Brown*, 447 U.S. at 470-71, precludes any suggestion that the governmental interests at stake here—residential tranquility, privacy, and public safety—are not equally substantial.

⁸ See also *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) (upholding restrictions on demonstrations at Russian Mission to the United Nations, relying, in part, on the privacy interests of residents living nearby).

sion." 466 U.S. at 806.⁹ The Court described the accumulation of signs on public property as a "visual assault on the citizens of Los Angeles," and thus a "significant substantive evil within the City's power to prohibit." *Id.* at 807. In this case, the residents of Brookfield seek protection not only from the "visual assault" of picket signs, but also from the jeering, shouting, and physical and verbal intimidation which naturally accompany picketing. See, e.g., J.A. 60-67; 80-84.

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld the constitutionality of a municipal ordinance prohibiting sound trucks from broadcasting in a loud and raucous manner upon the streets. Justice Reed's plurality opinion noted that while "[c]ity streets are recognized as a normal place for the exchange of ideas by speech or paper[,] . . . this does not mean the freedom is beyond all control." *Id.* at 87. The plurality further observed that "in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would . . . be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets." *Id.* at 87.

Ultimately, the residential tranquility, privacy, and public safety interests of Brookfield's residents must be weighed against the very limited restriction that the Brookfield ordinance imposes upon appellees' expressive activity. "[T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman v. City of Shaker Heights*, 418 U.S. at 302-03. The Brookfield

⁹ The Court expressly reaffirmed the conclusion of a majority of the Members of the Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), that the City's interest in esthetics justified a prohibition against the use of billboards. See *Taxpayers for Vincent*, 466 U.S. at 806-07.

ordinance does not in any way restrict marches through the neighborhood, distribution of leaflets in the neighborhood, door-to-door informational campaigns or solicitations, neighborhood meetings in parks or homes, or, for that matter, use of other media such as direct mail or telephone calls to residents, or radio, television, or newspaper appeals. See J.S. App. A-21 to A-22. Picketing activity is the only expressive activity proscribed, and only in a limited geographic area "before or about the residence or dwelling" of Brookfield's citizens—not in other areas of Brookfield or, of course, in front of Dr. Victoria's Appleton and Milwaukee clinics.

The weighing of competing interests also must take account of those characteristics that make picketing activity subject to stricter governmental regulation than other forms of expression. This Court has recognized "the compulsive features inherent in picketing, beyond the aspect of mere communication." *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950). Indeed, "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Id.* at 465. See also *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (picketing invites "an automatic response to a signal, rather than a reasoned response to an idea"); *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-77 (1942) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation.").¹⁰ Because of these distinctive features, picketing is not

¹⁰ In this case, for example, the picketers prevented family members from leaving their home, photographed the children, trespassed upon their property, and intimidated and harassed their neighbors. See J.S. App. A-10 to A-12; J.A. 60-64, 76-84.

afforded the same protection under the First Amendment as some other forms of expression. "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. at 555.

In sum, appellees' picketing activity is "basically incompatible" (*Grayned v. City of Rockford*, 408 U.S. at 116) with the residential streets of Brookfield, Wisconsin. Many other forms of expressive activity may be tolerated in such locations consistent with the domestic tranquility, privacy, and public safety of the residents, but it is clear that picketing is consistent with none of these vital values and may be prohibited.

So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.

Kovacs v. Cooper, 336 U.S. at 97 (Frankfurter, J., concurring).

II. EVEN IF PROPERTY IMMEDIATELY ADJACENT TO PRIVATE HOMES IN RESIDENTIAL AREAS CONSTITUTES A TRADITIONAL PUBLIC FORUM, BROOKFIELD'S ORDINANCE IS A PERMISSIBLE REGULATION OF THE PLACE AND MANNER OF EXPRESSIVE ACTIVITY.

Assuming that the Court determines to analyze this case by finding, as a threshold matter, that the property adjacent to Brookfield's residences constitutes a traditional public forum, the picketing ordinance must still be sus-

tained because it is a reasonable regulation of the place and manner of particular expressive activity. In the context of traditional public forums, this Court has held that a State may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass'n*, 460 U.S. at 45.

A. Content Neutrality.

In *Carey v. Brown*, *supra*, the Court invalidated, on equal protection grounds, an Illinois statute that prohibited residential picketing but exempted labor picketing. The Court expressly reserved the question "whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." 447 U.S. at 459 n.2. This case squarely presents that question. There can be no serious dispute that the Brookfield picketing ordinance is content-neutral. As the district court observed:

All residential picketing, regardless of the cause on behalf of which it is conducted, is unlawful in the Town of Brookfield. I see little merit in plaintiffs' argument that an implied exception for labor picketing must be read into an ordinance, the legislative history of which shows a precisely contrary intent.

J.S. App. A-17. Thus, unlike the statute invalidated in *Carey v. Brown*, the Brookfield ordinance makes no distinctions between picketing on the basis of content or subject.¹¹

¹¹ Appellees' equal protection argument rests upon an attempt to have this Court construe state law as modifying the scope of the ordinance by exempting labor picketing. This Court, however, "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Virginia v. American Booksellers Ass'n*, 108 S.Ct. 636, 643 (1988). See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985), and cases cited therein. Because the

B. Narrow Tailoring That Serves Significant Government Interests.

The requirement that a law affecting expressive activity be narrowly tailored to serve a significant government interest means simply that the scope of the enactment "may extend only as far as the interest it serves."¹² *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980). For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) ("CCNV"), this Court found that application of Park Service regulations to prevent sleeping in tents erected in Lafayette Park constituted "a reasonable regulation of the manner in which a demonstration may be carried out." *Id.* at 297. The Court suggested that perhaps the governmental objectives might "be more effectively and not so clumsily achieved by preventing tents

ordinance "appears on its face to be content neutral and completely without exception in its application" (Motion to Affirm 23), there is no basis for an equal protection challenge.

¹² Appellees also attack the Brookfield ordinance on grounds of "overbreadth." The "overbreadth" doctrine traditionally has been understood to allow a litigant "whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984). This aspect of the overbreadth doctrine is inapplicable here because appellees do not concede—or even suggest *arguendo*—that the ordinance is constitutional as applied to them. The "overbreadth" doctrine "has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Id.* If appellees intend by the use of the term "overbreadth" to invoke this aspect of the doctrine, their challenge is answered by this section of the brief. *Amici* submit that there is no reason to utilize the overbreadth doctrine where the traditional time, place, and manner test results in essentially the same analysis. *Cf. Taxpayers for Vincent*, 466 U.S. at 802 (declining to consider overbreadth challenge that was basically the same as an as-applied challenge).

and 24-hour vigils entirely in the core areas," and noted that the Park Service permitted other "non-sleeping demonstrations" on Lafayette Park grounds that might arguably have caused similar damage to park property. *Ibid.* The Court nonetheless found that the regulation "'responds precisely to the substantive problems which legitimately concern the [Government].'" *Ibid.* (quoting *Taxpayers for Vincent*, 466 U.S. at 810). The Court flatly rejected the court of appeals' determination that the regulation was not narrowly tailored because other alternatives less restrictive of expressive activity could have satisfied the government's interest in preserving park lands, for example, limiting the size, duration, or frequency of the demonstrations. The Court characterized these suggestions as (*id.* at 299)

no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that . . . the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Similarly, in this case, the Brookfield ordinance addresses precisely the domestic tranquility, privacy, and public safety concerns raised by picketing adjacent to the residences of the Town's citizens by prohibiting picketing only in that zone. This Court has repeatedly recognized that even peaceful picketing may cause certain disturbances or be inimical to the purpose for which surrounding property has been dedicated. *See, e.g., Carey v. Brown*, 447 U.S. at 465; *Cox v. Louisiana*, 379 U.S. at 554-55. Given the inherent nature of picketing (*see pp. 13-16, 18-19, supra*), the residents of Brookfield are entitled to view the presence of picketers looming in front of their homes for hours on end as an intolerable intrusion upon residential tranquility and privacy and to pro-

hibit such behavior. *Cf. Carey v. Brown*, 447 U.S. at 478 (Rehnquist, J., dissenting), citing *Wauwatosa v. King*, 49 Wis. 2d 398, 411-12, 182 N.W.2d 530, 537 (1971).¹³

The substantial evils here—the violation of residential tranquility and privacy and the public safety hazards—just like the visual blight unlawfully banned from all public property in *Taxpayers for Vincent*, are "not merely a possible byproduct of the activity, but [are] created by the medium of expression itself." *Taxpayers for Vincent*, 466 U.S. at 810. Even if it were possible to quibble about the precise parameters of the restriction upon picketing necessary to alleviate fully the harm in this case, this Court's decision in *CCNV* indicates that the judiciary shall not substitute its judgment for the decision of elected or appointed officials whose job it is to determine how much protection is wise and how it shall be achieved. *See* 468 U.S. at 299.

C. Availability Of Ample Alternative Channels Of Communication.

The Brookfield ordinance leaves appellees with ample channels of communication. In examining whether remaining modes of communication are "inadequate," this Court has looked to whether the advantages of the foreclosed medium can be obtained through other means and whether the foreclosed medium is "a uniquely valuable or important mode of communication." *Taxpayers for Vincent*, 466 U.S. at 812. It cannot fairly be disputed that the Brookfield ordinance preserves adequate means for appellees to make their views known to the intended audience of the picketing. As noted above, appellees are free to engage in marching, neighborhood leafletting and solicitations, hold meetings and rallies in parks and

¹³ "To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s] [T]he tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.'"

homes, and use the mails, telephone, radio, television, and newspapers to advance their views. They are also free to picket elsewhere. Perhaps the only unique feature of the restricted mode of expression—group picketing adjacent to the residences of Brookfield—is its ability to invade the privacy of the home and to shatter the peace and quiet of the neighborhood. The First Amendment does not require that the available channels be equally capable of destroying the residential tranquility and privacy of Brookfield's residents.

D. Brookfield's Ordinance Is A Permissible Exercise Of The Community's Police Power To Protect Residential Tranquility And Privacy By Restricting Certain Activity In Particular Locations.

The Brookfield ordinance also may be viewed as an appropriate geographic limitation of a certain type of speech-related conduct within the jurisdiction of the Town to enhance the quality of life for its residents. A town's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion). In *Young*, this Court held that Detroit's zoning ordinance which, *inter alia*, prohibited locating adult theaters within five hundred feet of any residential zone did not violate the First or Fourteenth amendments. 427 U.S. at 52, 72-73 (plurality opinion); *id.* at 84 (Powell, J., concurring). Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court sustained a zoning ordinance prohibiting adult motion picture theaters, concededly a mode of expression protected by the First Amendment, from locating within one thousand feet of any residential zone, single or multiple-family dwelling, church, park, or school. *Id.* at 43-47. The Court found that the ordinance was content neutral, designed to serve a substantial government interest, and did not unreasonably limit alternative avenues of communication, notwithstanding that only approximately five

percent of the land in Renton remained available for the location of adult theaters. *Id.* at 53-54.

Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

Id. at 54 (citation omitted).¹⁴

The Brookfield ordinance represents a similar lawful effort to limit a particular form of expressive activity to areas where it would not degrade the quality of residential life. *Amici* suggest that the community interests that support the constitutionality of a zone free of adult theaters support equally the creation of a residential zone free of picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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¹⁴ This Court in *Renton* applied the same standard of inquiry as it has applied in public forum cases. See *Renton*, 475 U.S. at 47 (citing and utilizing public forum standard in *CCNV*, 468 U.S. at 293).

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No. 87-168

SUPREME COURT
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-168

RUSSELL FRISBY, *et al.*,
v. *Appellants*,
SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions representing approximately fourteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. This case does not concern whether the Town of Brookfield may ban trespassing, undue noise, traffic obstruction, or obstruction of access to homes in its residential neighborhoods. The Town may do so directly, and in fact has done so: these laws may be evenly applied to pickets consistent with the First Amendment. Rather, this case concerns a facial challenge to a statute that bans all picketing in front of residences, whether orderly and quiet or noisy and disruptive. As in other facial chal-

lenges this Court has entertained, the particular circumstances of the picketing in this case are therefore irrelevant.

II. In recent years, this Court has applied a tripartite forum analysis in determining whether a particular regulation on the use of government property for expressive activity is valid or not. Under that analysis, it has been clear that on public streets, sidewalks, and parks, communicative activity is presumptively appropriate, and that any regulation must be narrowly confined. Although this Court has made clear that residential as well as commercial streets are public fora, the Town now requests that residential streets be declared nonpublic fora, subject to any reasonable, nonviewpoint-based regulation.

This invitation should be declined. The public forum doctrine is based on the recognition that for the robust debate of public issue protected by the First Amendment to take place, individuals without the resources to own or use expensive national media must be able to engage in face-to-face communication with other citizens in the accessible public areas most suitable for such communication. Thus, public fora are defined not by the government's intent to permit communication, or by the tradition with regard to the use of any *particular* public property for communication, but by the generic structural attributes of streets, sidewalks and parks that make those places particularly appropriate for communication among citizens. Since residential as well as commercial streets partake of these attributes, there is no basis for abandoning this Court's clear and definite delineation of all streets and parks as public fora.

III. The picketing ordinance here at issue is not a valid time, place and manner regulation of a public forum, for the simple reason that the ordinance forwards no legitimate significant state interest. Picketing as such presents no safety hazard, and to the extent particular pickets present any such danger they can be prosecuted

under existing law. As to the concern with privacy, the interest asserted in the statute itself is not a legitimate one, for the First Amendment does not permit individuals to be protected from criticism of their behavior regarding a matter of broad public interest. Nor does the ordinance advance any privacy interest focussing on the manner of the picketing beyond the protection already provided by neutral statutes that apply across the board. Finally, there is not an adequate governmental interest in protecting neighbors from viewing or considering the picket's message, since the ordinance applies regardless of whether that message can be seen from any other house.

ARGUMENT

I. The Challenge To The Ordinance "On Its Face."

Before discussing what this case does involve on the merits, it is worth noting what is *not* involved.¹ This case is *not* about whether the Town of Brookfield may, consistent with the First Amendment, protect the tranquility and safety of the Town's residents with regard to such matters as noise near their homes, access to their homes, trespasses upon their property or disorderly traffic on their streets. It is uncontested that public authorities may enact regulations that directly address these issues and may, in general, apply such regulations uniformly to individuals engaged in communicative activity and to individuals not so engaged. Brookfield has, in fact, acted on that understanding.

For example, the General Code of the Town of Brookfield contains ordinances prohibiting the obstruction of streets and sidewalks (§ 9.05), the creation of loud and unnecessary noise (§ 9.06), loitering (§ 9.08), the destruction of property (§ 9.09), littering (§ 9.10), trespass to land (§ 9.943.13), trespass to dwelling (§ 9.943.14),

¹ We leave the jurisdictional issue in this case to the parties.

and disorderly conduct (§ 9.947.01). See *Schultz v. Frisby*, 619 F. Supp. 792, 794-95 (E.D. Wis. 1985), *aff'd*, 822 F.2d 642 (7th Cir. 1987). Moreover, the Wisconsin Code provides, "No person shall stand or loiter on any roadway other than in a safety zone *if such act interferes with the lawful movement of traffic*," Wis. Stat. § 346.29(2) (emphasis added), and also prohibits the creation of an unreasonable risk of death or great bodily harm through placing obstacles upon a highway, tampering with traffic signs, giving false traffic signals, "or otherwise interfering with the orderly flow of traffic," Wis. Stat. § 941.03.

Thus, insofar as pickets make undue noise, obstruct traffic because of their numbers or pedestrian flow because of their behavior, or trespass upon property (Brief of the National League of Cities, As Amicus Curiae ("Cities' Br.") at 13), the pickets could be convicted under the foregoing enactments which do not regulate communicative activity as such. Of course, for any such conviction to be valid, it would have to be proven that in fact the actual conduct of the particular pickets violated the specific terms of the communication-neutral statute. For example, a picket could not be convicted of obstructing traffic on the ground that pickets sometimes obstruct traffic; actual obstruction would have to be shown. Thus, insofar as a picket was careful to move to the side of the road whenever a car came by, just as a responsible child playing softball in the street would do, he could accomplish his communicative purpose in a manner entirely consistent with the Town's legitimate interest in the free movement of vehicular traffic.

Brookfield, however, decided to go further than forbidding the possible side effects of picketing, and enacted a blanket ban upon all picketing in front of residences.²

² There are two possible reasons for proceeding in this fashion.

The first is to obviate the need to prove, on an individual basis, that one of the interests also served by a communication-neutral

It is this enactment—and not any other enactment that appellees may have violated in the past or could violate in the future—that is challenged here. Under the challenged ordinance appellees could be convicted even if their picketing conformed strictly to the rules that generally govern the use of Brookfield's streets in order to protect its residents' property, liberty, physical safety, and privacy interests. Thus, to escape conviction under the ordinance, appellees would have to abandon entirely the kind of communication (carrying signs with their message) and the location (in front of the home of the person whose actions caused their protest) appellees regard as most appropriate to bringing their message before the relevant public.

regulation has actually been infringed. For example, there are allegations in affidavits submitted on behalf of Brookfield that trespasses on property occurred before the ordinance was passed, as evidenced by the fact that red ribbons (an antiabortion symbol) were left on the lawns and bushes of the family that was the target of the picketing. See JA-61 (Affidavit of Todd A. Victoria); JA-62, 63 (Affidavit of Arlene Victoria); JA-69 (Affidavit of Reid Brueser). However, the police apparently lacked any direct evidence as to who trespassed, or even whether the trespasser was one of the pickets, or, instead, someone else who opposes abortions. And trespassing was by no means an inseparable part of residential picketing here; it is undisputed, for example, that for the most part, the pickets in this case kept to the public street. By enacting a blanket ban on picketing, the Town in effect simply assumed that the pickets were responsible, directly or indirectly, for the trespasses, and attempted to create a way of prosecuting the presumed culprits without having to prove that pickets in fact committed one of the wrongs now used to justify the ban.

The second is that there is indeed something uniquely harmful about residential picketing *per se* even if the picketing were conducted in conformity with all the generally applicable regulations concerning use of the streets.

As we show *infra*, at pp. 18-29, neither of these justifications for enacting the ban is sufficient to sustain its validity.

Faced with this situation, appellees decided to cease their picketing on the effective date of the ordinance, and to challenge the ordinance *on its face*. In other words, appellees are contending that the only behavior proscribed in terms by the ordinance—walking back in front of a residence with a sign carrying a message—may not, consistent with the Constitution, be absolutely forbidden. Given the posture of this case, the only question before the Court is whether the residential picketing ordinance as written is a valid regulation under the First Amendment;³ appellees' pre-ordinance conduct is entirely irrelevant.⁴

³ Appellants' suggestion that this Court may subject the ordinance to a "saving" construction in order to salvage its constitutionality, (Brief for Appellants ("Town Br.") at 47), is incorrect. The "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent" from the face of the statute. *Boos v. Barry*, No. 86-803 (March 22, 1988) Slip Op. at 16 (1988) (emphasis added). See also *Grayned v. Rockford*, 408 U.S. 104, 110 (1972); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972). The prohibition contained in the ordinance before the Court so broadly proscribes all residential picketing that no saving construction is "readily apparent."

⁴ Indeed, due to the procedural posture of this case, appellees have not engaged in any "conduct" which would support an "as applied" challenge. Although appellees have engaged in residential picketing in Brookfield, this conduct occurred prior to the enactment of the ordinance in question. Appellees brought the instant action in order to restrain application of the ordinance to future conduct in which appellees desire to engage. In such circumstances, the nature of their past conduct is irrelevant to their facial challenge, except to the extent that the fact of their past conduct demonstrates that their desire to picket in the future is genuine. See *City of Houston v. Hill*, — U.S. —, 107 S. Ct. 2502, 2508 n.7 (1987); see also JA-24 (Plaintiffs' Proposed Statement of Uncontested Facts) ("Plaintiffs wish to engage in peaceful picketing on the public street in front of 750 Briar Ridge Road. Plaintiffs do not wish to trespass on private property, engage in unruly, violent, or disruptive conduct, interfere with the free passage of pedestrians and vehicles, make excessive noise, harass anyone, or otherwise engage in unreasonable conduct.")

This Court has frequently upheld facial challenges to broadly worded statutes that conflict with First Amendment requirements. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 545 (1938); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Saia v. New York*, 334 U.S. 558, 561-62 (1948).

More recently, the Court discussed the relationship of this "facial invalidity" theory to the "overbreadth" theory "that allows a litigant whose own conduct is unprotected [by the First Amendment] to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 966 n.13 (1984).⁵ The Court concluded that, regardless of whether a particular challenge of this kind

should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands. [467 U.S. at 966, n.13]

See also *Boos v. Barry*, *supra*, Sl. Op. at 15 (sustaining, without regard to particular facts or conduct, facial First Amendment challenge to District of Columbia prohibition on displaying protest signs near a foreign embassy); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 787, 786-95 (1978), (sustaining, without regard to particular facts or conduct, facial First Amendment challenge to state law prohibiting business corporations from making expenditures to influence the outcome of referendum election questions which did not materially affect their property).⁶

⁵ In this case the appellees do not rely on the rights of third parties. Rather, appellees challenge the validity of the ordinance on the grounds that the ordinance unconstitutionally interferes with appellees' First Amendment rights.

⁶ *First Nat'l Bank of Boston v. Bellotti*, also demonstrates that the "facial invalidity" analysis is not affected by the fortuity that

The sole question here, then, is the constitutionality of a broad prohibition on residential picketing *per se*, not the constitutionality of a ban on picketing *plus* noise, picketing *plus* trespass, or picketing *plus* obstruction of access to property. That prohibition is constitutional only if the First Amendment allows public authorities to banish a lone picket carrying a sign in a peaceful, orderly, quiet fashion from the streets of residential neighborhoods. Indeed, the Town admits as much in arguing:

The complete ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of the person whose home is being picketed [Town Br. at 37.]

II. Streets In Residential Area As Public Fora.

A. Because this case concerns restrictions on free expression in an area—the streets of a town—which is maintained by the government for the use of the public and to which the public has free access, the problem presented is one that this Court has in recent years approached through a tripartite forum analysis. That approach was most recently summarized in *Airport Commissioners of Los Angeles v. Jews for Jesus*, — U.S. —, 107 S. Ct. 2568, 1571 (1987):

In balancing the government's interest in limiting the use of its property against the interests of those

the case may arise as a prospective challenge to a regulation rather than as an action to enforce that regulation. *See also City of Houston v. Hill, supra*, 107 S. Ct. at 2508 n.7 (“we have never required that a plaintiff ‘undergo a criminal prosecution’ to obtain standing to challenge the facial validity of a statute”) (quoting *Doe v. Bolton*, 410 U.S. 179, 188, (1973)); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, (1975) (sustaining prospective facial First Amendment challenge to ordinance prohibiting topless dancing without regard to the particular facts regarding appellees’ conduct prior to the enactment of the ordinance).

who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the forum created by government designation, and the nonpublic forum. *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45-46 (1983). The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny: “In these quintessential public forums, the government may not prohibit all communicative activity. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. . . . We have further held, however, that access to a nonpublic forum may be restricted by government regulation as long as the regulation is reasonable and not an effort to suppress expression merely because officials oppose the speaker's views.” *Id.* at 46.

Identifying in this typography the standards applicable to the present case is, one would think, a relatively simple matter. While there have been doctrinal difficulties in applying the tripartite forum analysis to various kinds of government property,⁷ the one given has been that “streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’” *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court has uniformly recognized that streets and sidewalks are traditional public fora, where “the government's ability to permissibly restrict expressive conduct is very limited” (*id.*), whether those streets and sidewalks abut schools (*Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. Rockford, supra*, the United States Supreme Court (*Grace, supra*), or foreign embassies (*Boos v. Barry*,

⁷ See pp. 22-24 n.17, *infra*.

supra). In all of those instances, while the precise location has been recognized as a factor in determining the validity of any time, place and manner restriction (see, e.g., *Grayned v. Rockford*, *supra*, 408 U.S. at 116)⁸, the location has not been a basis for holding that the public forum standards are *inapplicable*.

Indeed, this Court has expressly subjected streets and sidewalks in residential areas, as well as in commercial areas, to public forum analysis. Most prominently, *Carey v. Brown*, 447 U.S. 455 (1980), like this case, concerned picketing in residential neighborhoods; the parallel is so close that the ordinance at issue in *Carey* varied from the one in this case only in that the ordinance there permitted some, but not all, residential picketing. *Id.* at 457-59. And in *Carey* the Court began by determining that the public forum standards applicable to streets and sidewalks generally provide the pertinent principles:

There can be no doubt that in prohibiting picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). "[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights

⁸ "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would."

that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976) (quoting *Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968)).

* * * *

When government regulation discriminates among speech related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. [447 U.S. at 460-62, emphasis supplied.]

See also, treating communicative activity in residential areas as entitled to full First Amendment protection, despite the privacy interest asserted in such areas, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); cf. *Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147, 163-64 (1939).

Then, in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983)—where the tripartite forum analysis was first stated in its present form (*id.* at 45-46)—the Court pointed to *Carey* as one of the paradigm cases concerning a quintessential public forum:

Public property which is not by tradition or designation a forum for public communication is governed by different standards [than quintessential public forum. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . As we have stated on several occasions, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." [*United States Postal Service v. Council*

of *Greenburgh Civic Assns.*, 453 U.S. 114, 129-30 (1981), quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976), in turn quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966) . . .

* * *

In *Mosley* and *Carey*, we struck down prohibitions on peaceful picketing in a public forum. . . . In *Carey*, the challenged state statute barred all picketing of residences and dwellings except the peaceful picketing of a place of employment involved in a labor dispute. In both cases, we found the distinction between classes of speech violative of the Equal Protection Clause. *The key to those decisions, however, was the presence of a public forum.* [460 U.S. at 46, 54-55 (emphasis added).]

B. Despite the seeming clarity of this Court's pronouncements upon the public forum status of residential, as well as commercial, streets and sidewalks, Brookfield, and the *amici curiae* aligned with the Town, maintain that this Court should now reverse itself, and declare that the streets and sidewalks of residential neighborhoods are not public fora. Town Br. at 21-28; Cities' Br. at 7-12. The consequence of such a pronouncement, of course, could be to allow municipalities not only to regulate picketing activity but to declare those streets and sidewalks off limits, entirely or on a content-selective basis, to any form of communication including, for example, handbilling and oral or written solicitation of funds. *Perry Ed. Ass'n*, *supra*, 460 U.S. at 45-46.

To evaluate this remarkable proposal, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the public forum doctrine particularly. As this Court recently had reason to note:

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest

and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984). We have therefore been particularly vigilant to ensure that individual expression of ideas remain free from governmental imposed sanctions. . . . As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace. . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). [*Hustler Magazine v. Falwell*, — U.S. —, 108 S. Ct. 876, 879 (1988).]

Hustler Magazine involved "a magazine of nationwide circulation." 108 S. Ct. at 877. It has long been understood, however, that "the common quest for truth and the vitality of the society as a whole" (*id.* at 879) cannot be perfected simply by preserving the right of those with control over, or access to, privately-owned mass media to communicate free of the fear of censorship. This Court has therefore been careful to assure that the government does not, whether in the guise of regulation of public property or otherwise, close out from participating in the ongoing public debate fostered by the First Amendment individuals who do *not* have access to the technologically complex—and hence costly—communication modes of modern society. The First Amendment law in this regard recognizes that

The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be

hollow. [Stone, *Fora Americana: Speech in Public Places*, 1974 Supreme Court Rev. 233, 245].

Thus, in *Schneider v. State*, *supra*, the Court protected the right of religious and political minorities to distribute pamphlets and other literature either to passerby generally or by going door to door in residential neighborhoods. The Court began from general First Amendment principles, and then proceeded to explain why special solicitude for the right of the ordinary citizen to freely communicate with his fellow citizens is essential to achievement of those principles:

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. . . .

. . . . As [we] said in [*Lovell v. City of Griffin*, 303 U.S. 444 (1938)], pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of people. . . . To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at

the very heart of the constitutional guarantees. [*Schneider v. State*, *supra*, at 161, 164.]

See also *Martin v. Struthers*, *supra*, 319 U.S. at 147 ("Door to door distribution of circulars is essential to the poorly financed causes of little people.")

The public forum doctrine, then, rests on an allegiance to the free circulation of ideas and information and it is that allegiance which defines its parameters. The designation of a few, well-defined public areas, available in almost every town in the nation, as areas presumptively available for First Amendment activity serves as a minimal *guarantee* that communication among citizens is a use that must be accommodated in some public locations in some fashion:

However many the limitations, a system of freedom of expression is more firmly founded when it rests upon the strongly held premise that a constitutional right to use the streets and open places is the starting point from which discussion of limitations begins. [Emerson, *The System of Freedom of Expression*, 304.]

The question here thus becomes how this "[t]raditional public forum property [that] occupies a special position in terms of First Amendment protection" (*Grace*, *supra*, 461 U.S. at 180) is to be defined and delimited.

1. It is helpful at the outset to demonstrate that the restrictive definition proposed on the appellants' side has no basis in this Court's decisions. The National League of Cities argues that public fora are only those particular areas in a particular municipality that "traditionally have been used or considered as places for public gatherings and protests" or "were designed, built, or designated . . . as a public forum for communication." Cities' Br. at 10; see also Town Br. at 27 ("Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for this purpose.") But the public forum concept in no way turns on

the largesse of the local government or on whether a picket is the first or the third individual to engage in that kind of communication on that specific street.

From *Hague v. C.I.O.*, 307 U.S. 496 (1939), to the recent public forum cases this Court has recognized that the areas presumptively available for expressive activity were not created for that special purpose, and are in fact devoted to multiple uses: Streets are for transportation (*Schneider v. State*, *supra*, 308 U.S. at 150; *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), while parks are for recreation (*Hague*, *supra*, 307 U.S. at 505). As a general matter, then, neither streets nor parks are "designed, built, or designated" as communication facilities.⁹

Similarly, commercial streets and parks are no more "dedicated" by the government to expression than are residential streets. In neither cases does the local government typically consent to the use of business thoroughfares, or sidewalks abutting public buildings, for communicative activity. Rather, it is precisely because governments have repeatedly *refused* to consent to expressive use of streets and parks, and instead have asserted the right to ban such expression, that there have been a

⁹ See also, e.g., *Schneider v. State*, *supra*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.*, at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist".)

myriad of cases decided by this Court concerning prohibition of speech on public streets and parks.¹⁰

By disapproving those prohibitions, this Court has confirmed that "freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969). And consistent with the view that public forum designation is not consensual, this Court has insisted that public forum status is nondefeasible; "the government [may not] transform the character of property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, *supra*, 461 U.S. at 180.

Nor can the language of "tradition" in *Hague* and its progeny be read as a sort of adverse possession rule, permitting expressive activity only on those particular streets and in those particular parks where similar activity happens to have occurred before. The public forum doctrine, as we have seen, is fundamentally concerned with assuring the availability in every locale of public areas in which communication among citizens is safeguarded; it would make no sense for one individual's rights to turn upon whether other individuals with similar purposes had earlier seen fit to use precisely the same location.

¹⁰ See, e.g., *Grace*, *supra* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Carroll v. Princess Ann*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana*, *supra*, (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Jamison v. Texas*, 318 U.S. 413, 415 (1943) (ordinance forwarding city's view "that it has the power absolutely to prohibit the use of the streets for the communication of ideas"); *Schneider v. State*, *supra*, (same); *Hague*, *supra*, (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43 (1897) (ordinance forbidding public speaking in park).

Instead, the tradition referred to in the public forum cases is a generic one, based upon the common structural and functional elements which make streets and parks "natural and proper places for the dissemination of information and opinion." *Schneider v. State, supra*, 308 U.S. at 163. Those common elements were described by this Court in *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 651 (1981):

A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends. . . .

2. *Heffron's* description of a public forum fits residential streets even more closely than busy commercial thoroughfares.

First, streets, residential and commercial, are "continually open" both in the physical sense but, more important, in the additional senses that there is at all times free access to any member of the public, and that government permits a wide range of unregulated activity to go forward.¹¹ In residential areas, for example, children

¹¹ Without citation to the record (nor, as far as we are aware, any record support for the assertion), Brookfield maintains that "[t]he residential streets in question have never been held open, by tradition or designation, to all members of the general public to congregate upon, regardless of their own place of residence and lack of business or social purpose for being there." Town Br. at 23-24. It is not clear whether this statement represents that Brookfield, unlike almost every other town in the nation, actually reserves use of its streets to residents and invitees, rather than leaving the streets open for vehicular and pedestrian traffic generally, or whether the point made is that no special invitation to outsiders, for expressive purposes or others, has issued. In either event, as a factual statement with no predicate in the record of the case, it should be disregarded.

Further, insofar as this statement indicates that Brookfield actually limits entry into its residential neighborhoods to residents and invitees, the representation is entirely inconsistent with the

may play, neighbors may meet to exchange information about the new gardener or the latest national news, and an out-of-town bicycle club may circle the streets in a large group on Saturday mornings.

The primary result of this "openness" is that streets are locations in which at least some communicative activities are easily accommodated by applying the communication-neutral rules used to accommodate other non-transportation interests without disrupting the transportation purpose of the property. Consequently, *simply by not discriminating against communication*, government can usually accommodate a variety of expressive activity on the streets.¹² For the most part, then, on streets, including residential streets, as in parks, communication between citizens can be protected by applying the principle that "one who is rightfully on the street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in

Town's representation (also made without any citation to the record) that "[p]rotestors have not been barred from the residential neighborhoods." Town Br. at 41. Finally, if Brookfield indeed attempted to "privatize" the public streets in this manner, it would run afoul of this Court's rule that government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . ." *Grace, supra*, 461 U.S. at 180.

¹² The Town and its *amici curiae* make much of the fact that the particular subdivision involved in this case (but not necessarily, it appears from the affidavits and proposed stipulated facts, all the residential areas of Brookfield) has no sidewalks. But the result of this circumstance is in some respects quite the opposite to that the Town suggests: Because there are no sidewalks, it must necessarily be the case that a certain amount of pedestrian activity—including, in all likelihood, jogging, ball playing, and chatting—takes place in the street, and that the subdivision can do without sidewalks precisely because the street is so lightly traveled that nonvehicular uses are easily accommodated. The same would not be true, of course, of an interstate highway. But precisely for that reason, playing ball in the middle of that highway would presumably be illegal.

an orderly fashion." *Jamison v. Texas, supra*, 318 U.S. at 416.¹³ And where this is not the case, it will often turn out, upon analysis, that the governmental interest at stake is, in truth, precisely the suppression of the communication that is anathema under the First Amendment. Given the nature of streets, it is all but unimaginable that there will be many circumstances in which there is a legitimate interest in regulating expressive activity *alone* and not any of the myriad other uses of the street.¹⁴

The second element underlying the designation of streets, and not most other public locations, as quintessential public fora is that a street, including a residential street, is "a necessary conduit in the daily affairs of a locality's citizens, [and] also a place where people may enjoy the open air or the company of friends." *Heffron, supra*, 452 U.S. at 651. As a consequence, a street is an area in which an individual seeking to communicate is likely to find an audience of at least some

¹³ In limited circumstances the public forum doctrine encompasses, in addition to this nondiscrimination rule, some governmental obligation to permit expressive activity even when it would be legitimate to ban other (nonexpressive) activity because of the disruption that would be caused. For example, parades do stop the flow of traffic, and presumably a city could arrest as rioters large groups of people without any communicative purpose who swarmed onto the street, thereby stopping traffic. Nonetheless, while the right to engage in large group demonstrations in the streets may be tightly restricted (*Cox v. New Hampshire*, 312 U.S. 569 (1941)), it does not appear that parades may be forbidden entirely. *Gregory v. City of Chicago*, 394 U.S. 111 (1969). See generally Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Rev. 1.

¹⁴ See *Schneider v. State, supra*, 308 U.S. at 104 ("Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.")

individuals with the time and inclination to consider his message. Moreover, by choosing his street location, a speaker can focus his communication upon those he most wants to convince, thus avoiding the wasteful dispersal of the message to uninvolved and unconcerned listeners.¹⁵ And since there must be access to nearly every place that people live and work, designating streets in general as public fora means that a fairly wide choice of locations for communication are available, so that there may be little need to open up a wide variety of other government-owned areas as well.¹⁶

In short, looking at the matter in light of the public forum doctrine's purposes, residential streets share those functional elements that make a place a proper public forum. The streets are ideal locations for communication between ordinary citizens on important issues, in pursuit of the First Amendment's large goals of the free,

¹⁵ Here, for example, as in *Carey v. Brown, supra*, and *Organization for a Better Austin v. Keefe, supra*, the desire was apparently to communicate with the neighbors of a person with whom the pickets have a profound ideological disagreement, presumably in the hope that the neighbors might have some influence on that person.

¹⁶ Obviously, this interest would not be served by excising residential streets from the quintessential public forum category. To the contrary, as Judge Swygert noted in his eloquent panel opinion below, vacated when an en banc hearing was granted:

A holding that streets located in residential areas are not public forums would represent a radical departure from the general direction of first amendment jurisprudence. Such a holding would effectively place vast areas of this country out of the reach of the first amendment. Indeed, if streets like that fronting Dr. Victoria's home are not protected by the first amendment, then primarily residential towns, like Brookfield, may effectively confine the right of their citizens to be exposed to a diversity of views on issues of public concern to those tiny areas of the community classified as "commercial" or "governmental." [807 F.2d 1339, 1347.]

open interchange of ideas unrestricted by government control. This Court should therefore reaffirm in this case its longstanding and oft-repeated principle that on public streets, "the government's ability to permissibly restrict expressive conduct is very limited". *Grace, supra*, 461 U.S. at 177.¹⁷

¹⁷ Given the analysis presented in the text and this Court's oft-stated holding that streets generally, including residential streets, are quintessential public fora for First Amendment purposes, we consider only briefly the analysis applicable should this Court accept the invitation to exclude residential streets from the public forum category.

The tripartite forum analysis discussed in the text is simply "a workable analytical tool" (*City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815, n.32 (1984)), a "means of determining when the government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes" (*Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985)). For that reason, "in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of citizens at large", the forum analysis may not be helpful. *Taxpayers for Vincent, supra*, 466 U.S. at 815 n.32.

For example, as this Court noted in *Airport Commissioners of Los Angeles, supra*, 107 S. Ct. at 2571, "at least one commentator contends that [the deferential standard for nonpublic fora] does not control a case . . . in which the [speakers] already have access to the [forum], and therefore concludes that this case is analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." As that commentator stated:

When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not the issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. [See *Jamison v. Texas*, 318 U.S. 413, 416 (1943)]. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether

III. Regulation Within the Public Forum

To conclude that the attempt to vastly narrow the public forum doctrine must fail is hardly to determine the validity of the regulation at issue in this case. While

the school had a constitutionally sufficient reason to suppress their speech. [Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 N.W. L. Rev. 1, 48 (1986).]

While *Airport Commissioners of Los Angeles*, did not determine "whether the [deferential review] standard is applicable when access to a nonpublic forum is nonrestricted," (107 S.Ct. at 2571), the Court did apply a somewhat similar distinction to that suggested in the Laycock article in *Hazelwood School District v. Kuhlmeier*, — U.S. —, 108 S. Ct. 562 (1988). In that case, the Court first determined that schools generally are not traditional public fora, and that there was no intent on the part of school officials to permit indiscriminate use of the school newspaper there at issue by students. 107 S. Ct. at 567-69. The Court therefore held with respect to the school newspaper that "school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner." *Id.* at 569. At the same time, the Court maintained that:

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.

Thus, *Hazelwood School District* recognized that even if a governmental-owned or controlled location or activity is *not* a traditional public forum, there are still instances in which denials of the right to speak must be treated, for First Amendment purposes, as analogous to censorship, and subjected to careful scrutiny rather than simply to a reasonableness review. Those circumstances,

the precise formulation has varied in recent years, the general principle is that government may regulate the time, place and manner¹⁸ of expression in a public forum

the reference to *Tinker, supra*, indicates, involve situations in which the individuals seeking to speak are otherwise lawfully present on the property in question, and in which they are not asking for any special governmental action fostering speech, but simply to be judged by the same standards of conduct applicable to those lawfully present on the premises but not seeking to engage in communicative activity. Since that is the case here, the statute in question, which proscribes peaceful picketing without regard to whether the picketing is in any way disruptive (*compare Grayned v. Rockford, supra*), is invalid on its face whether or not the street in question is a public forum.

¹⁸ It is worth noting that this phrase is often used but has never been further defined or elaborated. While a "time" restriction is fairly self-evident and is readily distinguishable from complete exclusion of a mode of expression from a forum, regulations characterized as "place" and "manner" restrictions can also be characterized as complete exclusions from a more limited forum. For example, if the "forum" in this case is the particular street upon which Dr. Victoria lives, the exclusion of picketing is complete; in contrast, a "place" restriction that kept the pickets to within five feet of the curb, for safety reasons, would not be a complete exclusion even from the forum, narrowly defined. In contrast, if the "forum" is the town of Brookfield as a whole, the exclusion is not complete.

Similarly, because *all* picketing is banned, and not just disruptive, noisy, or trespassory picketing, the regulation can be denominated a complete exclusion of one mode of communication from a forum, and not simply a "manner" restriction. The Town, however, seems to view the restriction as one of "manner" because other means of communicating the same message to the same audience—handbilling, for example, or door-to-door solicitation—are permitted.

As to both these problems, the premises of the First Amendment public forum doctrine suggest that the autonomy of the speaker in choosing his basic location and method of communication should be given priority, and that the burden on the government to justify its regulation should increase the more the speaker is required to depart from his desired place and means of communication.

In particular, where a purported "place" restriction means that speakers must address themselves to a much larger audience than

as long as the regulation both has a sufficient nexus to a significant state interest and leaves open ample alternative channels for communication of the ideas sought to be conveyed. *Heffron, supra*, 452 U.S. at 648; *Grace, supra*, 461 U.S. at 181.¹⁹

Brookfield here asserts two interests: one in the safety of its streets, and one in the privacy and tranquility of its residential areas. As Judge Swygert noted below (807 F.2d at 1351), the safety interest is in no way a significant one; as far as the evidence indicates, even the large number of pickets who participated before the picketing ordinance was enacted did not constitute any traffic hazard upon what must be a seldom-travelled road, and certainly the lone picket who would violate the ordi-

the one the speakers seek to reach in order to get their message across, the government should have to demonstrate a more substantial interest to justify the restriction. Similarly, while some means of communication may be sufficiently different from others to qualify the more restrictive regulation of one than another as mere "manner" restrictions, transformations from face-to-face to less direct modes of communication so intrude upon the speaker's ability to fashion his own message as to be indistinguishable from direct censorship, and should be treated as such.

¹⁹ There has been considerable discussion in recent opinions regarding whether the "time, place, and manner" doctrine encompasses the "less-restrictive-alternative" approach. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). There well may be a difference in this regard depending upon whether the regulation is one applicable alike to those seeking to communicate and to others, as in *Clark*, or whether the regulation explicitly targets communicative activity. In the former instance, the speaker is in effect seeking a special privilege because of his First Amendment rights, and it may be an appropriate answer that speakers are not normally entitled to such a privilege if the regulation is evenhandedly applied across the board. In the latter instance, however, there is little to distinguish the regulation from direct censorship of speech, and a stricter level of scrutiny should therefore apply. In any event, the dispute is not here relevant, since, as shown in the text, the picketing regulation does not substantially advance any significant state interest.

nance would not, without more, constitute such a hazard. Moreover, a picket, as such, presents no safety danger different from that inherent in many other uses of the streets common in residential neighborhoods; since a proscription upon actual obstruction has been determined to be sufficient to cope with the possible traffic dangers posed by all other pedestrians, no reason appears why there is a significant state safety interest in more closely regulating pickets.

The question then becomes whether there is some significant legitimate interest in privacy substantially forwarded by the statute. In order to evaluate the significance and legitimacy of this asserted interest, it is necessary to be considerably clearer about what that interest is than the Town has been heretofore.

The privacy interest actually asserted by the preamble to the ordinance is one that focusses upon the reactions of the *target* of the picketing. Jurisdictional Statement, App. E ("the practice of picketing before or about residences and dwellings causes emotional disturbances and distress to the occupants"). It is understandable that individuals would rather not have their pursuits blasphemed before their neighbors. But there is no legitimate governmental interest in protecting the flow of information on a matter of public interest, simply because the individual who is criticized feels aggrieved or coerced.

This Court so held in *Organization for a Better Austin v. Keefe*, where the pertinent facts were precisely analogous: handbillers were informing a real estate agent's neighbors that he engaged in blockbusting, as a pressure tactic to convince him to cease doing so. The Court held that there is no legitimate governmental interest in ending the real estate agent's discomfort, which was a direct result of the communication itself:

The claim that the expressions were intended to exercise a coercive impact on respondent does not

remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged in openly and vigorously making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability. . . .

Designating the conduct as an invasion of privacy is not sufficient. . . . *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) . . . is not in point [because] respondent is not attempting to stop the flow of information into his own household, but to the public. [402 U.S. at 419-20.]

See also *Hustler Magazine v. Falwell*, *supra*.

While there are at least two more aspects of the picketing that could be said to violate "privacy" interests, neither falls within the asserted purpose of the ordinance and neither should therefore be considered as a legitimate justification. It is nonetheless worth examining each in the interest of completeness and showing that those interests, while legitimate, are not significantly forwarded by the ordinance. See Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. at 263, discussing essentially two varieties of privacy interests in the public forum context; *viz.*, protection from exposure to ideas, and protection from disturbances due to the particular means of communication.

In this instance, the latter interest is plainly not substantially forwarded by the regulation. For, as we have seen, the ordinance prevents picketing even when it is perfectly peaceful, quiet, nonobstructive, and nontrespassory, and even though there are other ordinances

that ban directly the possibly annoying side effects of picketing.²⁰

Nor do the neighbors of the picketed person have a significant interest in being spared from the pickets' message, whether that message is the one on their signs or the one conveyed by their simple presence. Unlike a ban on sound trucks, midnight telephone calls, or offensive television or radio programs, the ban here is not limited to intrusions into the home. And outside the home,

[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of person predilections. [*Cohen v. California*, 403 U.S. 15, 21 (1971).]

Here, the ordinance applies without regard to any such focussed interest balancing. Again, picketing is proscribed regardless of the message communicated; and while the message that was communicated may well have been offensive to many of the neighbor's, there is no doubt that—and the Town concedes—the message is one that could not have been banned had it been communicated in precisely the same way on the Town's sole commercial street, where more people may have seen it.

- In short, there is no significant interest that is substantially forwarded by this ban on communication, and the ban is therefore invalid without more.

²⁰ Nor is there any legitimate separable interest in eliminating an inchoate fear of unknown strangers near one's house. The door-to-door solicitation cases make that clear. *Martin v. City of Struthers*, *supra*; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1987

No. 87-168

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE
AND THE RUTHERFORD INSTITUTES OF
ALABAMA, ARKANSAS,
CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA,
GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA,
OHIO, PENNSYLVANIA, TENNESSEE, TEXAS,
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AMICI CURIAE, IN SUPPORT OF APPELLEES

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IN THE
Supreme Court of the United States

October Term, 1987

No. 87-168

RUSSELL FRISBY, et al.,
Appellants,
v.

SANDRA C. SCHULTZ, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE
AND THE RUTHERFORD INSTITUTES OF
ALABAMA, ARKANSAS,
CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA,
GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA,
OHIO, PENNSYLVANIA, TENNESSEE, TEXAS,
VIRGINIA AND WEST VIRGINIA,
AMICI CURIAE, IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE¹

This case presents important issues regarding the

¹ Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

definition of privacy and constitutionally permissible infringements on First Amendment activity. There is currently a tendency to invoke "privacy" as a defense of broad restrictions on constitutionally-protected rights, in this case freedom of speech, without analyzing what the term actually means. Such a process jeopardizes constitutional rights because it subordinates those rights to a murky, ill-defined concept that affords no principled basis for delimiting either individual rights or legitimate state interests. The interests that have been legally recognized as protected by "privacy" are few, and The Rutherford Institute believes that those interests should not be expanded to limit First Amendment expression in the public arena.

Amici curiae are nonprofit religious corporations named for Samuel Rutherford, a seventeenth-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Between April 20 and May 20, 1985, the Milwaukee Coalition for Life, a pro-life group, sponsored several picket lines in Brookfield, Wisconsin. The picketers stood in front of residence of Dr. Benjamin Victoria, a physician who performs abortions, to protest Dr. Victoria's involvement in the abor-

tion industry. J.S. App. A-5 to A-6. There is evidence that some picketers were noisy and that another trespassed on Dr. Victoria's property. JA-50 to JA-52. Rather than addressing these alleged abuses of the right to picket, the Town of Brookfield adopted an ordinance prohibiting picketing around any residence of any individual. J.S. App. A-8. The United States District Court for the Eastern District of Wisconsin granted a preliminary injunction against enforcement of the ordinance, finding it to be an overly broad restriction on free speech. A panel of the Court of Appeals for the Seventh Circuit affirmed. After rehearing *en banc*, an equally divided Court of Appeals affirmed, without opinion, the judgment of the district court.

SUMMARY OF ARGUMENT

One of the asserted justifications for the Brookfield ordinance is a need to protect residential privacy. A close examination of legally recognized privacy rights, however, reveals that none of those rights affords a sufficient justification for a broad ban on First Amendment activity. The first legally protected privacy right is spatial privacy, which is closely related to ownership interests. Any actual invasion of these privacy interests, however, can be solved by narrowly-focused laws that do not infringe on First Amendment free speech rights. The second group of values - the right to make family decisions - is also not jeopardized by residential picketing. A ban on such activity, then, does nothing to protect the right. The final set of interests protected by privacy is the right to be free from unwanted communications and undue psychological pressures - the "right to be let alone." Although this privacy interest may be implicated by residential picketing, it is not so threatened as to justify the sweeping restrictions on First Amendment expression in the public arena that are imposed by the Brookfield ordinance. The residents of

Brookfield are not a captive audience requiring complete protection by the government at the expense of the First Amendment, and any psychological harassment is insufficient to justify decreased protection for the right to free speech. The privacy interests present in this case do not outweigh First Amendment values.

I. INTRODUCTION

Appellants claim that the Brookfield ordinance is a legitimate and necessary protection of the citizens' right to privacy. Significantly, however, appellants do not define the specific nature of this alleged "right to privacy" or its scope. Instead, they use the term as a nebulous but powerful talisman to justify visceral reactions to infringements of unstated values. This amorphous use of the "right to privacy" invites both legislative and judicial bodies to make their decisions without analyzing or admitting the values involved. It also creates a serious risk that important legal, and in this case constitutional, rights will be overridden in favor of emotionally appealing but legally unsound arguments.

Although privacy interests are rightly accorded substantial weight in our legal system, their relative weight is dependent upon the delineation of the precise nature and extent of such interests. "[P]rivacy is not a metaphysical entity, but an ethical and legal boundary that we prescribe for others and ourselves. . . . Its value is then a derivative of the value we attach to the possibility of the conditions and activities it protects." Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L.Rev. 233, 245 (1977).

The nature of the privacy interests protected by American law may be analyzed as falling into three legally cognizable categories. The first privacy interest that the law

protects is closely connected to ownership interests and concerns the right of an individual to decide what will occur on his or her property. This interest - spatial privacy - is not jeopardized by residential picketing on a public street. The second group of privacy rights are those involving the decisions that an individual makes regarding his or her family. These family rights, rooted in both common and constitutional law, are not threatened by residential picketing. The final set of interests can best be classified as "the right to be let alone." This interest has always been subordinated to First Amendment rights.

All of these privacy interests "must be placed in the scales with the right of others to communicate." *Rowan v. Post Office Department*, 397 U.S. 728, 736 (1970). The balance that the Town of Brookfield has struck in this case denies the citizens of Brookfield their constitutional right to free speech in the public arena without offering significantly increased protection for privacy. To the extent that privacy interests are implicated in the instant case, they do not justify a broad prohibition on residential picketing and may be equally well protected by less restrictive regulations.

II. A COMPLETE BAN ON RESIDENTIAL PICKETING IS NOT NECESSARY TO PROTECT SPATIAL PRIVACY RIGHTS

The first interest protected by the right to privacy -- spatial privacy -- is closely connected to property rights and protects the activities of a person on, and the enjoyment and use of, his or her own property. This interest has its roots far back in the English common law. In a speech directed at general warrants, William Pitt eloquently described these rights in now-familiar words:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his forces dare not cross the threshold of the ruined tenement.

1 T. Cooley, *Constitutional Limitations* 610 n. 2 (8th ed. 1927). In colonial America, James Otis invoked the same theme in his speeches against writs of assistance, in which he stated, "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle." 2 *Legal Papers of John Adams* 141-44 (Wroth & Zobel eds. 1965). Cf., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) ("A man's home is his castle").

This spatial privacy interest, however, like the property interests from which it is derived, is not without limitations and is not invariably absolute. "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

The limited nature of spatial privacy interests is demonstrated by an examination of the Bill of Rights, which also links these interests to property rights. The First Amendment, for example, prevents the state "telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley v. Georgia*, 394 U.S. 557, 560 (1969) (striking down a statute making private possession of obscene material a crime). That right, of course, is limited to the confines of one's own home. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66-67 (1973) (upholding regulation of obscenity at adult theater); *United States v. Orito*, 413 U.S. 139, 141-43 (1973) (upholding federal statute prohibiting transportation

of obscene materials).

The Third and Fourth Amendments also protect spatial privacy. The Third Amendment, with its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is a protection of privacy that is limited to the owner's property line. Cf., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting Third Amendment's protection of privacy).

Spatial privacy is a core value of the Fourth Amendment.² "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home" *Payton v. New York*, 445 U.S. 573, 589 (1980);³ cf., *Oliver v. United States*, 466 U.S. 170 (1984) (areas other than those immediately surrounding the home are not subject to Fourth Amendment requirements).

All of the above-mentioned spatial privacy interests end at the boundaries of the subject property, however, and cannot be used to justify a restriction on First Amendment expression that occurs outside those boundaries. The Court noted this dividing line in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), where it upheld a federal statute

² The protection of the Fourth Amendment is, of course, not limited to a particular place. *Katz v. United States*, 389 U.S. 347 (1967). The Fourth Amendment also protects the privacy right "to be let alone," in addition to the spatial privacy interests mentioned above. See *infra*, pages 17-18.

³ See also *United States v. Karo*, 468 U.S. 705, 712, 714 (1984) (installation of beeper in a car transferred to suspect did not violate Fourth Amendment rights; monitoring of beeper in a private residence did violate those rights); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("Katz held that . . . the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place").

allowing a person to request removal of his or her name from the mailing lists of certain advertisers. The Court recognized the First Amendment rights of the advertisers, but held that "[t]he asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Id.* at 738. *Cf., United States v. Karo*, 468 U.S. at 712 (no Fourth Amendment violation; "[I]t cannot be said that anyone's possessory interest was interfered with in a meaningful way").

Perhaps the clearest example of the limits of spatial privacy is *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971). In *Keefe*, the Court reversed an injunction against the distribution of leaflets about a real estate broker by a community organization. The real estate broker claimed that the leaflets invaded his privacy, but this Court held that that claim was not sufficient to support a restriction of First Amendment activity. "Among other important distinctions, respondent is not attempting to stop the flow of information into his household but to the public." *Id.* at 420. Thus, although the real estate broker had every right to prevent distribution of the leaflets on his property, he had no right to halt distribution on the property of others or on the public streets.

Spatial privacy is no more protected by the ban in the instant case than it was by the ban in *Keefe*. The right of a person to control his property is not jeopardized when other individuals walk or speak on the public streets; therefore, a ban on such activity does not protect that right. This Court has recognized that principle in regard to other infringements on First Amendment activity. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court invalidated a city ordinance prohibiting door-to-door solicitation by organizations not using at least 75 percent of their receipts for "charitable purposes." One of the interests asserted in support of the ordinance was a need to protect individual privacy. The Court rejected this argument. "The ordinance is not directed to the unique privacy interests of

persons residing in their homes because it applies not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways.'" *Id.* at 638-39. The Brookfield ordinance, like the Schaumburg ordinance, applies to public streets and highways. Indeed, the behavior prohibited by the Schaumburg ordinance, door-to-door solicitation, impinged much more upon spatial privacy than does picketing on the public streets. Nevertheless, the Supreme Court invalidated the ordinance. Likewise, the Brookfield ordinance, which addresses itself *solely* to First Amendment activity on the public streets and restricts the same, cannot be justified as a means of protecting spatial privacy.

In only one case has the Court allowed speech occurring in the public arena to be restricted for the sake of spatial privacy. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld a determination by the Federal Communications Commission that a monologue was indecent and therefore could not be broadcast over the air. The Court noted that the indecent broadcast invaded "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748. In *Pacifica Foundation*, the only governmental restriction that could protect the privacy interest was a content-related ban on certain types of broadcast messages. In the instant case, however, any spatial privacy interests can be adequately protected by less restrictive time, place, and manner regulations that take into account the unique character of residential areas.

For example, Wisconsin has enacted statutes providing both criminal and civil penalties for trespassing upon private property.⁴ Wis. Stat. Ann. §943.13 (West 1982) (criminal

⁴To the extent that the Brookfield ordinance purports to restrict trespassers, it is superseded by state law. *Cf., Anchor Savings and Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984). The enforceable portion of the ordinance, then, is directed at peaceful picketing on the public streets. *City of Houston v. Hill*, ____ U.S. ____, 107 S. Ct. 2502, 2508-09 (1987).

trespass to land); §943.14 (West 1982) (criminal trespass to dwellings); §844.01 (West 1977) (civil action for physical injury to, or interference with, real property). Cf., *Village of Schaumburg*, 444 U.S. at 639 (provision permitting homeowners to bar solicitors from their property by posting signs cited as less intrusive and more effective measure to protect privacy); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (homeowner may post signs to prevent door-to-door solicitors from intruding).

The city could also protect homeowners from excessive noise by enacting a valid noise ordinance. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949). An ordinance restricting noise would not only provide a less intrusive means of protecting privacy interests, but, because this problem is not unique to picketing, it would provide a more effective means of protecting spatial privacy interests than does the current ban on picketing. The Town of Brookfield could also restrict the numbers of picketers or the times of picketing. Cf., Note, *Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation*, 63 Wash. U.L.Q. 71 (1985) (advocating restricting First Amendment activity to daylight hours).

In conclusion, it is clear that the spatial "right to privacy" cannot serve as a justification for the Brookfield ordinance. Spatial privacy encompasses no more than the right to be free from physical, visual, or aural intrusion within the boundaries of one's possessory interests. The ordinance in this case prohibits activity far outside those limited boundaries. Quiet and peaceful picketing on nearby public streets does not implicate spatial privacy. To the extent that a government wishes to prevent abuse of the right to picket, it may do so by enacting narrowly focused ordinances tailored to the interests protected. "Narrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible

to draft." *Gregory v. City of Chicago*, 394 U.S. 111, 124 (1969) (Black, J., concurring).

III. THE RIGHT TO MAKE FAMILY DECISIONS DOES NOT JUSTIFY A BAN ON RESIDENTIAL PICKETING.

A second set of interests protected under the rubric of privacy is the right to make certain decisions regarding one's family. Protected in part by the constitutional right to privacy,⁵ those decisions that have been recognized by the Court include child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); marriage, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); and whether to beget and bear children, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1947). Once again, these rights are not all-encompassing. They are limited to the interests served -- a parent's right to structure the family unit. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in *their own household* to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629 (1968) (emphasis added). Family rights, limited as they are to the family unit, impart no authority to restrict activity in the public arena absent an intrusion into the family circle.

In the instant case, there is no threat to the parents' right to rear their children. Residential picketing implicates that right only to the extent that it may present information to

⁵ The constitutional right of privacy, of course, only protects an individual against government intrusion, so it is not directly at issue in this case. The constitutional right does illustrate, however, the interests that are at stake.

children that their parents would prefer they not have. The Court has consistently held, however, that this interest is subordinate to First Amendment free speech interests. In *Carey v. Populations Services International*, 431 U.S. 678 (1977), the Court held unconstitutional a New York statute that prohibited the distribution of contraceptives to anyone under the age of 16. One of the justifications offered by the state was the need to protect citizens, including children, from being exposed to material that they might find offensive. The Court recognized this interest, but nevertheless struck down the statute, noting that those interests "are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 701.

More recently, the Court considered a parent's interest in restricting information in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The case involved a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. Among the interests asserted in support of the statute was the state's effort to aid parents' discussion of birth control with their children. The Supreme Court recognized this interest as "undoubtedly substantial," *id.* at 75, but nevertheless invalidated the statute as an ineffective means of furthering that interest. The Court noted that parents already have control over the information received through the mailbox, and that they must also cope with the other avenues through which their children receive information regarding contraceptives, such as magazine advertisements, drug store displays, and sex education courses. "Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so,

and whose children have remained relatively free from such stimuli." *Id.* at 73.

A ban on residential picketing is a similarly ineffective means of protecting the right of family privacy. Although picketing may expose children to information that parents would prefer them not to have, that problem is not unique to residential picketing. A ban on such activity does not protect a family from intrusion by door-to-door canvassers, magazines, or other media. A ban on residential picketing is an effective protection of family privacy only to the extent that children have remained free of information from other sources. Given the low probability of that circumstance, and the lack of evidence demonstrating its presence in this case, appellants cannot justify the ordinance as a protection of family privacy.

Furthermore, a parent's right to protect children from receiving information is limited both by the First Amendment and by the child's right to receive that information. "Speech that is neither obscene as to youths nor subject to other legitimate prescription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

In the current case, for example, it is clear that the young people of Brookfield can receive contraceptive and abortion services regardless of their parent's wishes. *Carey*, 431 U.S. at 691-701 (plurality opinion); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). It would be highly illogical to allow the city to "protect" those same young people from opinions opposed to those same services. It is not only illogical, but unconstitutional for the Town of Brookfield to attempt to shield minors from protected speech in the

public arena. The ordinance brings within its sweep speech that is clearly protected by the First Amendment, which both outweighs and limits family privacy.

In summary, family privacy rights are not jeopardized by residential picketing, and are not protected by a prohibition of such activity. To the extent that parents have an interest in insuring that their children do not receive information from picketers, that interest is superseded both by the picketers' right to First Amendment expression and by the children's right to receive information. Family privacy cannot justify prohibition of speech in a public arena.

IV. THE RIGHT "TO BE LET ALONE" DOES NOT JUSTIFY THIS BROAD BAN ON FIRST AMENDMENT ACTIVITY.

The final group of interests protected by the concept of privacy is an individual's right to be free of unwanted opinions, disturbances, and psychological harassment. These interests have been summed up in Justice Brandeis's classic phrase, the "right to be let alone, . . . the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Protected from governmental intrusion by constitutional provisions, an individual also has common law tort protection against invasion of privacy by private persons. This right not to be bothered is the only relevant justification for the Brookfield ordinance. The right to be let alone, however, cannot provide in this case what it has failed to provide in others - a justification for depriving individuals of their chosen audience for peaceful First Amendment expression.

A. The Citizens of Brookfield Are Not a Captive Audience Needing Complete Protection from Residential Picketers.

As a general rule, a person offended by someone else's First Amendment expression has the responsibility of avoiding it.⁶ It is only when the unwilling listener is unable to avoid the message that the government may step in to protect him or her.⁷ Even then, the government may intervene only if "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21.

Residential picketing is not such an intolerable invasion of an individual's privacy interest. Peaceful picketing does not create the sort of visual and audible intrusions that justify state inhibition of First Amendment activity. *Cf.*, *Kovacs v. Cooper*, 336 U.S. at 87; *FCC v. Pacifica Foundation*, 438 U.S. at 749. The only physical manifestation of the picketers' presence is the sight of them standing outside one's home. An individual can easily avoid seeing the picketers and their message by looking the other way. *Cf.*, *Erznoznik*, 422 U.S. at 210-11; *Cohen*, 403 U.S. at 21. In this respect, residential picketing imposes much less on individual privacy than does such already approved forms of First Amendment

⁶ *Consolidated Edison v. Public Services Commission*, 447 U.S. 530 (1980) (recipient of unwanted mailing that easily can be thrown away); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (inadvertent viewer of a drive-in movie screen may look the other way); *Cohen v. California*, 403 U.S. 15, 21 (1971) (person viewing offensive message on another's jacket may look the other way).

⁷ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307-08 (1974) (riders of public transportation); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (people in business and residential areas unable to avoid amplified message); *International Society for Krishna Consciousness, Inc. v. Rockford*, 585 F.2d 263, 268 (7th Cir. 1978) (dicta) (persons in line at airport waiting for tickets). See generally, Comment, "I'll Defend to the Death Your Right to Say It ... But Not To Me" - The Captive Audience Corollary to the First Amendment, 1983 S. Ill. U. L.J. 211.

activity as door-to-door solicitation. *Village of Schaumburg*, 444 U.S. 620; *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Martin v. City of Struthers*, 319 U.S. 141 (1943). Cf., *Breard v. Alexandria*, 341 U.S. 622, 639 n.27 (1951) ("Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection"), quoting, Z. Chaffee, *Free Speech in the United States* 406 (1941).

It must also be recognized that protecting individuals from unwelcome interruptions of their daily life can be a form of content-based discrimination. After all, it is usually not the communication itself that prompts the restriction on free speech, but the fact that the content of the communication is something that an individual would rather not hear. Protecting a person from intrusive speech, then, invokes the same content-based restrictions that pose the greatest danger to First Amendment values by suppressing dissent and unpopular viewpoints. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *Hague v. CIO*, 307 U.S. 496, 516 (1939). Because of this danger, speech cannot be restricted based solely on whether or not a listener is annoyed by it. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). For this reason, an ordinance purporting to protect individuals from unwanted communications must be narrowly drafted to avoid making the right of free speech contingent on the propriety of the speech. "[S]o long as the means are peaceful, the communications need not meet standards of acceptability." *Keefe*, 402 U.S. at 419.

Finally, individuals are able to ignore most unwanted messages. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153, 183-84 (1972). "Indeed, one might argue that the possibilities of unwelcome messages penetrating the psychological armor of unwilling audiences are so small that we ought to be worrying more about how to help unpopular communicators get through to reluctant listeners than how to give further protection from speech to

those who may already know too well how to isolate themselves from alien ideas." *Id.* at 184.

In short, there is no evidence that the citizens of Brookfield are a captive audience requiring complete protection from residential picketing. Any unconscionable physical, audible, or visual intrusions may be dealt with by appropriately-written ordinances that do not completely ban First Amendment activity on a public street. Rather than passing an ordinance designed to protect its citizens from expression because of its content, Brookfield should recognize the vitality of First Amendment rights and protect them accordingly. The right of every person to be let alone does not justify the sweeping restrictions on public free speech imposed by the Brookfield ordinance.

B. The Psychological Pressure of Residential Picketing Does Not Justify a Complete Ban on Such First Amendment Activity.

The one remaining privacy interest at issue in this case is the psychological pressure that a resident feels just from knowing that there are picketers outside his home. *Wauwatosa v. King*, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971); cf., *Gregory v. City of Chicago*, 394 U.S. 111, 126 (1969) (Black, J., concurring); Arnolds & Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?*, 1982 S. Ill. U.L.J. 463, 475 ("Simply put, residential picketing restrictions protect the right 'to be let alone' in one's home").

This interest in being free from psychological pressure is protected by many facets of American law. It is protection from the psychological effects of having private information about oneself distributed to others that underlies the protec-

tions of various constitutional rights.⁸ At the beginning of the twentieth century, Professor Pound argued: "Another phase [of the human personality] is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy." Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 362 (1915).

In 1890, Samuel Warren and Louis Brandeis almost single-handedly created a tort right of privacy. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Seventy years later, Dean Prosser categorized the cases recognizing a right to privacy into four distinct torts.⁹ Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). Although these rights outline four distinct interests, "each represents an interference with the right of the plaintiff 'to be let alone.'" Prosser & Keeton, *The Law of Torts* §117, at 851 (5th ed. 1984); see also, *Restatement (Second) of Torts* §652 comment b (1977) (each tort involves "interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears, and publications of others").

Tort law, then, involves the same privacy interest asserted by the City of Brookfield to justify its absolute ban on residential picketing - the right to be free from the psychologi-

⁸ *United States v. Jacobsen*, 466 U.S. 109, 116-18 (1984) (Fourth Amendment); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (constitutional right to privacy includes interest in avoiding disclosure of personal matters); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (Fifth Amendment). See generally, A. Westin, *Privacy and Freedom* 349, 350 (1967).

⁹ Those four torts are: (1) intrusion upon the plaintiff's solitude or seclusion; (2) public disclosure of embarrassing private facts about an individual; (3) publicity that places an individual in a false light in the public eye; and (4) appropriation of an individual's name or likeness. *Restatement (Second) of Torts* §§652B-652E (1977).

cal pressure of forcible submission to the opinions or curiosity of others. This right is not absolute and must be subordinated to the First Amendment right to free expression in the public arena. Because of this fact, many actions otherwise prohibited by the tort right of privacy must be allowed in order to adequately protect First Amendment rights.

For example, one of the arguments urged as a justification for the ordinance in this case is that the picketers are using their free speech rights to harass and intimidate others. Although such an assertion might be relevant in a tort case, it is of no significance here. The First Amendment protects peaceful speech, regardless of whether it is coercive or merely expressive. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"); *Keefe*, 402 U.S. at 419 (fact that speech intimidates others is not in itself a justification for prohibition). Even speech that is motivated by hatred or ill will is afforded certain First Amendment protections. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Similarly, the publication of false statements about an individual can give rise to tort liability. Adequate protection of First Amendment values, however, requires that an injured person who is also a public figure or involved in a matter of public interest prove that the defendant acted out of malice. *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974) (matter of public concern); *Time v. Hill*, 385 U.S. 374 (1967) (public figure); cf., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (malice standard not required in matter of private concern). Accord, *Hustler Magazine, Inc. v. Falwell*, No. 86-1278 (U.S. S.Ct. Feb. 24, 1988) (applying malice standard to intentional infliction of emotional distress). The sole reason for this reduced expectation of privacy is that the First Amendment requires it. "Exposure of self to others in varying degrees is a concomitant of life in a civilized commu-

nity. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time v. Hill*, 385 U.S. at 388.

The principle of these cases is clear. Although protection from psychological pressures may be a legitimate state interest, adequate protection of First Amendment values requires decreased protection for privacy. The psychological pressure faced by the residents of Brookfield is undoubtedly less than the psychological pressure suffered by the plaintiffs in *Time v. Hill*. Picketers outside one's home are certainly a nuisance, but they are not a 24-hour phenomenon, they are not likely to be a permanent fixture, and the audience is limited. A false magazine article, on the other hand, is available to anyone, anywhere, at any time, and remains a threat to privacy for as long as a copy of the article exists.

Furthermore, an individual who is subjected to picketing is usually targeted because of a particular course of action that that individual willfully decided upon, as in this case where Dr. Valentine deliberately chose to perform abortions, knowing that the procedure is a highly controversial one. The Hill family, on the other hand, had no control over their situation. They became involved in a matter of public interest through no decision of their own, and in fact contrary to their wishes.¹⁰ Yet, the Hill family had to accept decreased protection for their privacy in order to safeguard the First Amendment. There is no reason that residents of Brookfield should not do likewise.

¹⁰ Cf., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 255 (1974) (Douglas, J., dissenting) ("A bridge accident catapulted the Cantrells into the public eye and their disaster became newsworthy"); Wis. Stat. Ann. §895.50 (2)(c) (West 1983) (tort action for invasion of privacy for publication of private facts "if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved or with actual knowledge that none existed").

It is significant that the Wisconsin legislature in 1977 codified three of the four invasion of privacy torts. An injured individual may recover for intrusion upon his privacy, appropriation of likeness, or publication of private facts. Wis. Stat. Ann. §895.50 (West 1983). The legislature recognized the First Amendment limitations on the right of privacy, stating that the right was to be interpreted "with due regard for maintaining freedom of communication, privately and through the public media." §895.50(3). As part of that due regard, the legislature specifically stated that the available remedies for violation of these privacy rights do not include "prior restraint against constitutionally protected communication privately and through the public media." §895.50(1)(a). Such a prior restraint is exactly what the Brookfield ordinance is. The town of Brookfield has legislated a prohibition on First Amendment expression in the name of individual privacy that the state legislature has specifically barred as a means of protecting that right.

The pivotal question in this case is not whether picketing creates some degree of psychological pressure. Nor is the question whether a government may provide residents complete protection from that psychological pressure at the expense of First Amendment freedoms. It clearly may not. The question is whether the psychological pressure in this case is so great as to justify curtailment of First Amendment rights. The Town of Brookfield has an interest in protecting its residents' privacy, but it has a greater responsibility to safeguard First Amendment values. "The state interest in protecting the privacy of individuals is simply one instance of its general role as overseer of conflicting human activities. Its interest in guaranteeing the exercise of the speech is less frequently recognized but rests on the same premise." Comment, *Picketers at the Doorstep*, 9 Harv. C.R.-C.L. L. Rev. 95, 113 (1974).

In summary, any interest in preventing psychological harassment is not sufficient to justify the broad ban imposed on free speech in the instant case. In cases presenting much greater invasions of privacy, the Supreme Court has consistently required decreased privacy protection in favor of increased First Amendment safeguards. The Town of Brookfield has overreacted and created a serious interference with an enumerated, paramount constitutional right in the name of a privacy interest that does not warrant such complete protection. In this case, it is the privacy rights that must be limited. "[S]uch a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Falwell*, slip op. at 10.

CONCLUSION

Privacy is the chameleon of the law, able to change its form according to the dictates of the prevailing legal fashions. It lends itself well to emotionally appealing arguments, and is useful for making those arguments seem more cogent than they actually are. In this case, privacy has been made a euphemism for protecting residents from speech that they would simply rather not hear. The right to privacy in reality protects only three legal interests: spatial privacy, family decisions, and the right to be let alone. None of these interests justifies the sweeping restrictions on free speech in the public arena enacted by the Town of Brookfield. Privacy has never been granted complete legal protection at the expense of the First Amendment and has in fact been consistently subordinated to that right. Any legitimate state interests in this case may be met by narrow time, place, and manner restrictions that do not jeopardize freedom of speech. The preservation of constitutional rights requires sacrifice, not just by government, but by each individual who desires the protection of those freedoms. Any annoyance and inconvenience caused by

residential picketing is not too great a price to pay to preserve the invaluable and indispensable right to freedom of expression.

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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RUSSELL FRISBY, *et al.*,

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**BRIEF AMICI CURIAE OF AMERICAN LIFE
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No. 87-168

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
 COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF AMICI CURIAE OF AMERICAN LIFE
 LEAGUE, INC., CHRISTIAN ADVOCATES
 SERVING EVANGELISM, AND FREE SPEECH
 ADVOCATES IN SUPPORT OF APPELLEES**

INTEREST OF AMICI CURIAE¹

This case presents important issues concerning the freedom of speech for all Americans. The American tradition of free and open discourse in public places, including streets

¹ This brief *Amici Curiae* is filed pursuant to Rule 36 of the Rules of this
 (cont'd)

and sidewalks, has contributed greatly to the success of our democracy. American Life League, Inc., Christian Advocates Serving Evangelism, and Free Speech Advocates are opposed to Appellants' sweeping prohibition of cherished First Amendment freedoms.

American Life League, Inc., is a pro-life organization with a national membership, representing over 500,000 Americans. The League works to develop national policies in the defense of all human life from fertilization to death. The League conducts educational programs and performs research aimed at informing citizens of their God-given right to life and of the need to defend that right and to restore the enjoyment of that right to unborn children.

Christian Advocates Serving Evangelism is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel of Jesus Christ in public places.

Free Speech Advocates is a legal defense organization dedicated to protecting, preserving and defending the right of public witness and speech on behalf of the unborn child.

Amici's legal counsel have specialized in litigation in both state and federal courts with regard to various First Amendment issues. Mr. Jay Alan Sekulow serves as Counsel with each *amicus* and has appeared before the Court in *Board of Airport Commissioners of Los Angeles v. Jews For Jesus*, 107 S. Ct. 2568 (1987). Dr. Charles E. Rice is a professor of Constitutional Law at Notre Dame Law School. Amici believe that the experience of its counsel will be of assistance to the Court in this case.

Amici are particularly concerned by a disturbing tendency to undermine cherished First Amendment freedoms by wrongly using the right of privacy in matters where abor-

Court on behalf of American Life League, Inc., Christian Advocates Serving Evangelism and Free Speech Advocates. The parties have consented to the filing of this brief; a joint letter consenting to the filing of this brief is on record with this Court.

tion interests are perceived. Even this case has been referred to as one of "a small flurry of cases that represent non-traditional abortion challenges," "High Court Faces Novel Challenges To Abortion," *Nat'l L. J.*, Mar. 21, 1988, at 5, col. 1.

In other case scenarios, the traditional public forum sidewalks in front of abortion facilities are made prohibited zones for free speech. For example, the City of Boulder, Colorado actually adopted the following in response to peaceful picketing on the public right of way in front of a Boulder abortion clinic:

Section 1. A new Section 5-3-10 is enacted to read:

5-3-10 Harrassment Near Health Care Facility.

No person seeking to pass a leaflet or handbill to or display a sign to or engage in conversation, protest, counseling, or other verbal exchange with a second person, within one hundred feet of a health care facility, shall approach closer than eight feet of such person, unless such second person gives express oral consent to do so; and upon request of such second person, no such first person shall fail to withdraw to at least eight feet from such second person or in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such conversation, protest, counseling, or other verbal exchange. For the purposes of this subsection, distance shall be measured from any extension of the first person's body, including without limitation a sign, to any part of the second person's body.

Boulder City Ordinance No. 4982 (1986). Incredibly, such an ordinance was found constitutionally sound by the United States District Court for the District of Colorado, *Buchanan*

v. Jorgensen, Docket No. 87-Z-213 (D. Colo. 1987). See also *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), cert. dismissed for want of jurisdiction, 55 U.S.L.W. 3494 (1987). Such regulations and decisions demonstrate that the "Court's unworkable scheme for constitutionalizing the regulation of abortion," has had its debilitating consequences throughout our system. *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2206 (1986) (O'Connor, J., dissenting). It is not only this Court, but other governing units and the culture as well, that "make[] it painfully clear that no legal rule or doctrine is safe from ad hoc nullification . . . when an occasion for its application arises" involving abortion. *Id.*

STATEMENT OF THE CASE

Amici adopt the summary of facts presented in the Brief for Appellees.

SUMMARY OF ARGUMENT

The ordinance of the Town of Brookfield, Wisconsin, which imposes a sweeping ban on peaceful, public issue picketing on public streets and sidewalks, is constitutionally defective.

It is beyond dispute that peaceful picketing on issues of public importance is an activity protected by the First Amendment. *Carey v. Brown*, 447 U.S. 455, 461 (1980). That the residential streets of Brookfield, Wisconsin, are traditional public fora, suitable for expressive First Amendment activity is an axiomatic principal of constitutional jurisprudence. *Hague v. C.I.O.*, 307 U.S. 496 (1939). Certainly a sweeping prohibition of a cherished First Amendment activity, which creates a virtual "First Amendment Free Zone", does not constitute a narrowly drawn regulation of speech serving a compelling state interest.

The ordinance on its face purports to prohibit all picketing. State law, however, specifically allows labor picketing in residential neighborhoods. Under the Equal Protection

Clause, governments may not grant access to a forum to those groups it finds acceptable, but deny access to those exposing more controversial or less favored views. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Therefore, the Brookfield Ordinance is constitutionally defective, in that it violates the Equal Protection Clause, as well as the First Amendment.

The all-encompassing nature of the ordinance, prohibiting all picketing, cannot be justified even in a nonpublic forum. The ordinance is substantially overbroad and is therefore constitutionally impermissible. *Jews for Jesus*, 107 S. Ct. 2568.

This Court cannot legitimately assign superseding importance to the unenumerated right of privacy over the enumerated First Amendment rights of free exercise of religion, free speech, free press, peaceful assembly, and petition.

ARGUMENT

I. THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1254(2).

Appellants have sought to invoke the jurisdiction of this Court under 28 U.S.C. §1254(2).² In order for jurisdiction to be properly invoked under 28 U.S.C. §1254(2), the court of appeals must squarely have held "that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds." *Burger King*

² Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

....
(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

....
28 U.S.C. (1254(2)).

Corp. v. Rudzewicz, 471 U.S. 462, 470 n.12 (1985) (citations omitted). Further, "it must be reasonably clear that the [court of appeals] independently concluded that the challenged statute governs the case and [that it] held the statute itself unconstitutional as so applied." *Id.*

This Court has ruled on the mechanics by which jurisdiction attaches under 28 U.S.C. §1254(2). *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). "We have concluded that it is time that this undecided issue [whether 28 U.S.C. §1254(2) imposes a requirement of finality of judgment] be resolved. We therefore hold . . . that in a situation such as this one, where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under §1254(2)." 106 S.Ct. at 2176.

Exercising jurisdiction in this case is not proper. In the present case, after preliminarily enjoying enforcement of the controverted ordinance, the district court offered to permit the preliminary injunction to become permanent without further proceedings. *Schultz*, 619 F. Supp. 792, 798 (E.D. Wis. 1985). The Town of Brookfield, however, rejected that opportunity and sought appellate review of the preliminary injunction.

On appellate review of a preliminary injunction regarding the enforcement of a state statute, the appropriate standard for review of the order of the district court is the "abuse of discretion" standard. *Doran v. Salem Inn*, 422 U.S. 922 (1975). That standard was employed by the Seventh Circuit panel that originally reviewed the issuance of the preliminary injunction in the present case. *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986). The panel decision, employing the abuse of discretion standard, found no such abuse of discretion. That decision was vacated and a rehearing *en banc* was granted by *Schultz v. Frisby*, 818 F.2d 1284 (7th Cir. 1987).

In a later proceeding, the court of appeals, evenly divided and without issuing an opinion, affirmed the district court decision. The court's action is support for no proposition other than that Appellees are reasonably likely to succeed on the merits of their claim. *Schultz v. Frisby*, 822 F.2d 642 (7th

Cir. 1987), *aff'g* 619 F. Supp. 792 (E.D.Wis. 1985). The court remanded for "any further proceedings deemed necessary." *Jurisdictional Statement A-1*.

Without an opinion from the court of appeals, it cannot be stated that the court of appeals "squarely" held anything with regard to the constitutional repugnancy of the Town of Brookfield General Code §9.17. Certainly, the absence of an opinion may not be cited as making "reasonably clear that the court independently concluded that the challenged statute governs the case and [holding] the statute itself unconstitutional as so applied." *Burger King*, 471 U.S. at 470. In *Thornburgh*, with regard to the attachment of jurisdiction under 28 U.S.C. §1254(2), this Court was presented with a set of facts under which a plausible argument could be made that the requirement of *Burger King* had been met. For, in *Thornburgh*, at least, the Third Circuit had gone beyond mere review for abuse of discretion and had addressed itself to substantive questions of the constitutionality of the Pennsylvania abortion statutes.

Because jurisdiction does not attach under 28 U.S.C. §1254(2), the Court should dismiss the present appeal.

II. THE TOWN OF BROOKFIELD'S ABSOLUTE PROHIBITION OF PICKETING ON RESIDENTIAL SIDEWALKS AND STREETS GOES FAR BEYOND PERMISSIBLE REGULATION OF A PUBLIC FORUM UNDER THE FREE SPEECH CLAUSE OF THE FIRST AND FOURTEENTH AMENDMENTS.

The extent to which government may burden free speech is dependent upon a three-step analysis. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.* 473 U.S. 788, 797 (1985). This analysis begins with a determination of whether the activity in issue is deemed protected speech under the First Amendment. *Id.* When the disputed activity is found to be protected expression, the Court must determine the nature of the forum in issue. *Id.* The extent to which government may regulate protected First Amendment speech depends upon the nature of the forum.

A. PEACEFUL PICKETING ON ISSUES OF PUBLIC IMPORTANCE IS PROTECTED SPEECH.

Appellees desire to engage in peaceful, public issue picketing. Appellees' *Motion to Affirm* 1-2. The underlying issue of public concern is the destruction of unborn children by abortion and specifically the role of Benjamin Victoria, a Brookfield abortionist, in the community. *Brief of Appellants* 5-6. This Court in *Carey v. Brown*, 447 U.S. 455, 460 (1980), recognized that peaceful picketing on public streets and sidewalks in residential neighborhoods is "conduct that falls within the First Amendment's preserve."

Because of its importance to the free exchange of ideas, public issues picketing has always rested on the highest rung of First Amendment values. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Carey*, 447 U.S. at 467-68 (quoting *Strickland v. California*, 283 U.S. 359 (1931)).

Limiting public access to divergent opinions on religious, political, economic, or social issues leads inevitably to concentrating power into the hands of those groups which can command large or majority followings. The religious dissenter and the political maverick alike will be pushed to conformity and extinction in a sterile America. Clearly, peaceful public issue picketing is a protected First Amendment activity.

B. SIDEWALKS AND STREETS IN RESIDENTIAL NEIGHBORHOODS ARE TRADITIONAL PUBLIC FORUMS.

Certainly, "[s]treets, sidewalks and parks are considered, without more, to be public forums" *United States v. Grace*, 461 U.S. 171, 177 (1983). For purposes of First Amendment analysis, residential streets and sidewalks will not lose their character as traditional public forum property for the rea-

son that they abut "property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. This is, as this Court stated in *Hague v. C.I.O.*, because "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515. This Court, in *Grace*, determining that the sidewalks surrounding the Supreme Court building were traditional public forums, recognized that:

The sidewalk comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C. and we can discern no reason why they should be treated any differently . . . In this respect, this case differs from *Greer v. Spock* . . . [where] the streets and sidewalks at issue were located within enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of the city itself. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

Id. at 179-180. Likewise, the streets where Appellees desire to conduct their peaceful public issue picketing are indistinguishable from any other municipal street or sidewalk in Brookfield. The facts in this case have not established any separation, fence, or other indication suggesting that one has entered some special enclosure. On the spectrum of the public properties, the residential streets of Brookfield, Wisconsin are certainly a far cry from secured military bases, the curtilage of jail houses, *Adderly v. Florida*, 385 U.S. 39, 41 (1966), or foreign embassies, *Boos v. Barry*, 1988 U.S. LEXIS 1445.

C. THE TOWN OF BROOKFIELD'S ABSOLUTE PROHIBITION OF PROTECTED SPEECH IN A TRADITIONAL PUBLIC FORUM IS UNJUSTIFIABLE.

The power of government to limit expressive activity in a traditional public forum is sharply circumscribed. *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 38, 45 (1983). In public forum properties, such as streets, parks and sidewalks, any regulation of speech must be necessary to serve a compelling state interest and narrowly draw to achieve that end. *Carey*, 447 U.S. at 461.

The sweeping prohibition of peaceful picketing in residential neighborhoods as contained in the ordinance at issue in this case is the most restrictive means imaginable to accomplish any conceivable governmental interest. It achieves its goal only by reducing the overall quality of expression and totally eliminating protected First Amendment speech. In *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1971), this Court advised municipalities that the proper approach to control excesses that occasionally accompany picketing was "by narrowly drawn statutes focusing on the abuses...." The Town of Brookfield's ordinance is nothing more than legislative laziness.

The Town of Brookfield's asserted interest in protecting and preserving residential privacy does not create such a compelling interest rising to the level of prohibiting all peaceful picketing. *Carey*; *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Gregory v. Chicago*, 394 U.S. 11 (1968). There are ordinances in Brookfield's General Code which more narrowly serve the Town's interest in preserving residential privacy by addressing specific wrongs that might occur during picketing. See *Motion to Affirm Addendum* (collecting ordinances of the Town of Brookfield).

A review of ordinances that sweepingly prohibit First Amendment protected activity establishes that such prohibitions do not satisfy the requirement of narrowly tailored regulations. In *Martin v. Struthers*, 319 U.S. 141 (1943), this Court struck down as unconstitutional, an ordinance prohibiting all residential pamphletting. This Court stated that:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.

Id. at 146-47. This Court made clear in *Struthers* that a more appropriate means of preserving residential privacy would have been for the City of Struthers, Ohio, to enforce the posted wishes of individual property owners.

In *Board of Airport Commissioners v. Jews for Jesus*, 107 S. Ct. 2568 (1987), this Court unanimously held that an airport regulation prohibiting all First Amendment activity from taking place in the airport terminal was a "sweeping ban" and could not be justified even in a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech. *Id.* at 2572.

Most recently, this Court has stated that an ordinance of the District of Columbia, protecting the dignity of foreign diplomats from the display of signs that tend to bring such diplomats or their nations into "public odium" or "public disrepute" was not sufficiently narrowly tailored to withstand exacting scrutiny. *Boos v. Barry*, 1988 U.S. LEXIS 1445. The Court assumed the ordinance was enacted to secure a compelling interest.

In the final analysis, Brookfield's sweeping prohibition of all picketing on residential sidewalks and streets is not a narrowly drawn regulation and therefore is unconstitutional.

III. THE TOWN OF BROOKFIELD'S ABSOLUTE PROHIBITION OF PEACEFUL PICKETING ON RESIDENTIAL SIDEWALKS AND STREETS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Brookfield ordinance purports to prohibit all peaceful public issue picketing on residential sidewalks and streets. The Supreme Court of Wisconsin, however, has construed

Wisconsin statutes as protecting the right to peacefully picket residences as part of labor disputes when the residences are also places of business. *Senn v. Tile Layers Protective Union*, 222 U.S. 383, 268 N.W. 270 (1936).

The Supreme Court of Wisconsin, in *Wisconsin's Environment Decade v. D.N.R.*, 85 Wis. 2d 518, 529, 271 N.W.2d 69, 74 (1978), held that "A city cannot...lawfully forbid what the legislature has expressly licensed, authorized or required...." Thus, in effect, the Brookfield ordinance must allow labor picketing to take place on residential sidewalks and streets. Yet, all other peaceful picketing is prohibited by the ordinance. This selective censorship is nothing more than content discrimination and a clear violation of the Equal Protection Clause.

In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), this Court utilized equal protection analysis to overturn a Chicago City ordinance that discriminated among speakers based on the content of their speech, permitting certain labor related picketing to take place in the vicinity of a school, but prohibiting all other picketing in the same vicinity. See also *Carey v. Brown*, 447 U.S. 455 (1980). In *Mosley*, this Court held:

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

408 U.S. at 95-96.

Appellants have failed to justify the distinctions between labor picketing and the picketing Appellees desire to conduct. Furthermore, when governmental regulations discriminate among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be "finely tailored to serve substantial interests." *Carey*, 447 U.S. at 461-62. As previously established, the ordinance's sweeping prohibition fails to justify any distinctions between permis-

sible and nonpermissible picketing and it has failed to "be finely tailored." The ordinance violates the Equal Protection Clause and is, therefore, unconstitutional. *See also Widmar v. Vincent*, 454 U.S. 268 (1981).

IV. THE TOWN OF BROOKFIELD'S ORDINANCE PROHIBITING PEACEFUL PUBLIC ISSUE PICKETING ON RESIDENTIAL STREETS AND SIDEWALKS IS UNCONSTITUTIONALLY OVERBROAD.

The Town of Brookfield's ordinance prohibiting peaceful public issue picketing on residential streets and sidewalks is unconstitutionally overbroad.

Even if the residential streets and sidewalks were deemed nonpublic forums, the ordinance on its face still contravenes the First Amendment. The prohibition of all peaceful picketing is substantially overbroad and cannot be tolerated by our system of freedom of expression. *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 107 S. Ct. 2568 (1987); *New York v. Ferber*, 458 U.S. 747, 769 (1982).

An enactment is "overbroad" if in its reach it prohibits constitutionally protected conduct." *Grayned v. Rockford*, 408 U.S. 104, 114 (1972). The rationale of the overbreadth doctrine is that "because First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963); accord, *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Therefore, restrictions on the exercise of First Amendment rights "must be narrowly tailored to further the [s]tate's legitimate interest." *Grayned*, 408 U.S. at 116-17; accord, *Chase v. Develaar*, 645 F.2d 735 n.10 (9th Cir. 1981). "Broad prophylactic rules in the area of free expression are suspect Precision of regulation must be the touchstone." *Button*, 371 U.S. at 438 (citations omitted); accord, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

The overbreadth doctrine is necessary to safeguard the First Amendment's "breathing space" for two reasons. First, an ordinance that:

does not aim specifically at evils within the allowable area of [s]tate control but on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press readily lends itself to harsh and discriminatory enforcement by [public] officials against particular groups deemed to merit their displeasure . . . [and thus] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). Even more vital to free expression, though, is the need that overbroad laws be judicially nullified in order that they may not have a "chilling effect on free expression." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

"[T]he peculiarly vulnerable character of activities protected by the first amendment," Tribe, *American Constitutional Law* §12-24, at 711 (1978) and their "supremely precious" nature, *Button*, 371 U.S. at 433, require that they be regulated with "sensitive tools." *Burton v. Municipal Court*, 68 Cal. 2d 684, 692, 441 P.2d 281, 286, 68 Cal. Rptr 721, 726 (1968). A "demonstrably overbroad [regulation] may deter the legitimate exercise of first amendment rights," *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975), for the threat of sanctions may be almost as potent a deterrent "as the actual application of sanctions," *Button*, 371 U.S. at 433. The "very existence" of overbroad regulations may cause those who do not wish or dare to become engaged in litigation "to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

This deterrent or "chilling" effect is minimized by the overbreadth doctrine, which mandates that an overbroad regulation be declared "invalid on its face" and unenforceable against anyone. *Chase*, 645 F.2d at 737.

The facial overbreadth doctrine is applicable where governmental regulations "by their terms purport to regulate the

time, place, and manner of expressive or communicative conduct." *Broadrick*, 413 U.S. at 613. Hence, "[T]he crucial question" is whether the ordinance in this case "sweeps within its prohibition what may not be punished" under the First Amendment. *Grayned*, 408 U.S. at 114-15.

In this case, the overbreadth arises from the blanket nature of the ordinance's prohibition. All peaceful picketing is purportedly prohibited, even labor picketing protected by state law. Rather than narrowly tailoring precise regulations, as the First Amendment commands, the ordinance instead, in classic fashion, "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms," *NAACP v. Alabama ex. rel. Flowers*, 377 U.S. 288, 307 (1964).

As this Court unanimously held in *Jews for Jesus*, "We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."

CONCLUSION

Free speech is essential to the maintenance of a just and free society. Peaceful public issue picketing is a form of protected expression and should not be subjected to restriction in the traditional public forum, other than reasonable time, place, and manner regulation. When expression, including picketing, is proscribed, the regulation must be narrowly tailored to serve compelling governmental interests. If such regulation or proscription fails to be narrowly tailored or is not supported by compelling interests, it cannot stand.

Because of their cherished role in society, fundamental freedoms are accorded a special measure of protection under the Equal Protection Clause. A regulation of speech that discriminates on the basis of content violates principles of equal protection. Anything less than the closest fit of "means to ends" violates equal protection. Any discriminatory treatment of a fundamental right cannot stand if it is not supported by compelling governmental interests.

The ordinance's sweeping prohibition is unconstitutional. The unenumerated right to privacy should not be permitted by this Court to become a vehicle for the destruction of cherished First Amendment freedoms.

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In The
Supreme Court of the United States

October Term, 1987

RUSSELL FRISBY, et al.,

Appellants,

v.

SANDRA C. SCHULTZ, et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE
AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF
ILLINOIS AND AMERICAN CIVIL LIBERTIES
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NO. 87-168

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RUSSELL FRISBY, et al.,
Appellants,

v.

SANDRA C. SCHULTZ, et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN
CIVIL LIBERTIES UNION, AMERICAN CIVIL
LIBERTIES UNION OF ILLINOIS AND
AMERICAN CIVIL LIBERTIES UNION OF
WISCONSIN IN SUPPORT OF APPELLEES

INTEREST OF AMICI

Amici curiae are the American Civil Liberties Union (ACLU), the American Civil Liberties Union of Illinois and the American Civil Liberties Union of Wisconsin.¹ ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to the defense of the principles embodied in the Bill of Rights. The American Civil Liberties Union of Illinois and the American Civil Liberties Union of Wisconsin are state affiliates of the national organization. The American Civil Liberties Union of Wisconsin participated before the trial and appellate courts as amicus.

¹ A joint letter of consent to the filing of all amicus briefs has been lodged with the Court.

Amici have a special interest in the free speech values protected by the First Amendment to the Constitution. This case presents a direct assault on one of the most fundamental modes of expression in a traditional public forum. The ordinance at issue absolutely bars all peaceful, orderly picketing "before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield General Code. § 9.17(2). Because amici believe that orderly picketing on the public streets and sidewalks is protected by the First Amendment, we submit this brief in support of the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the trial court's issuance of a preliminary injunction.

STATEMENT OF THE CASE

The issue in this appeal is whether the trial court was correct when it held that an absolute ban on residential picketing was likely to be held unconstitutional after a trial on the merits.²

The record at the preliminary injunction hearing showed that appellees engaged in peaceful, public issue picketing. The question of abortion is a

² Appellants contend that this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1254(2)(1988). (Br. of Appellants at 16-21.) They argue that this case satisfies the requirement, under Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), that the judgment appealed from be final. The finality requirement is not met here because the district court entered only a preliminary injunction. The town appealed, and the Seventh Circuit affirmed that preliminary injunction without opinion. F.2d 822 643. There is no section 1254(2) jurisdiction when, as here, the merits remain in the district court for further proceedings. See Thornburgh, 476 U.S. at ___, 106 S.Ct. at 2176.

highly political one, with well-defined arguments and high emotions on each side. It is one of the most hotly debated public issues of our day. Activists and concerned citizens on each side of the issue can be seen in every community across the country, engaged in speech and expressive conduct aimed at persuading others to join forces in this public debate.

The plaintiffs are citizens who oppose abortion. They organized pickets of the home of a doctor who performs abortions in two nearby communities. The record shows that the pickets generally lasted an hour or two in length, with ten to 15 persons participating. (J.A. 29, 40, 42, 46.)³

Dr. Victoria, the subject of the

³ "J.A." refers to the Joint Appendix filed by the parties.

picketing, lives in a subdivision of Brookfield known as Black Forest. The record shows that Black Forest contains only 14 homes. (J.A. 49.) It has no sidewalks, but the streets are 30 feet wide. There is no evidence in the record that discloses whether any other neighborhood in Brookfield has these characteristics. The town passed the ban in apparent reaction to the picketing at Dr. Victoria's home.

Prior to the passage of the ordinance, Dr. Victoria's home was picketed several times.

No actual evidence of any ongoing congestion or real threat to safety or other valid governmental interest was presented. The evidence suggested that there was an apparent trespass on the Victoria property shortly after one of the pickets. No arrest or prosecution

occurred. (J.A. 69-70.)

It is also suggested that, on one occasion, picketers may have blocked the egress of one of the Victoria family members; however, no law enforcement action was taken. (J.A. 61.) There is no suggestion that Brookfield's disorderly conduct or anti-noise ordinances were violated.

The town contends that the ordinance has two goals: to protect the public safety and to safeguard privacy. At the same time, it concedes that certain protected First Amendment activities are permitted throughout Brookfield, including on the public way before Dr. Victoria's home. This same group of people may march through the neighborhood, singing and chanting. They may go door to door, visiting Dr. Victoria and his neighbors. They may

leaflet throughout the neighborhood. (Br. of Appellants at 41-42.) The only expressive conduct the ordinance prohibits is residential picketing.

This case was heard on a motion for a preliminary injunction. The trial court found that all four factors for preliminary injunctive relief had been satisfied. Schultz v. Frisby, 619 F. Supp. 792, 796 (E.D. Wisc. 1985), aff'd without opinion, 822 F.2d 642 (7th Cir. 1987). Ruling that the prohibition would likely fail as a reasonable time, place and manner restriction because not "narrowly tailored," the court granted the preliminary injunction. The defendants appealed, and the Seventh Circuit affirmed en banc without opinion.⁴

⁴ The vacated panel decision is reported at 807 F.2d 1339.

The matter comes to this Court in the posture of a preliminary injunction. The record is a skeletal one, consisting almost solely of affidavits of participants in and witnesses to the picketing. See 619 F. Supp. at 793. The merits are not ready for review because further factual development is needed.

The only issue is whether the district court abused its discretion in issuing the preliminary injunction. Synanon Foundation, Inc. v. California, 444 U.S. 1307 (1979) (per Justice Rehnquist as Circuit Justice); Brown v. Chote, 411 U.S. 452, 457 (1973).⁵ If

⁵ Appellants argue that plenary review is appropriate because the trial court made errors of law. (Br. at 4.) The trial court identified and applied the appropriate time, place and manner analysis. 619 F. Supp. at 796. A review of appellants' arguments reveals that, contrary to their suggestion, they take issue with the application of law to facts. Thus, the "abuse of discretion" standard is appropriate.

the Court takes certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988), it should affirm the decision of the Seventh Circuit, and allow the litigation to go forward in the trial court to a final resolution of the case.

SUMMARY OF ARGUMENT

The ordinance is an absolute ban on a traditional form of communication in a traditional public forum. Both the forum and the manner of expression have long been protected by this Court.

The site of this picketing is an important part of the picketers' message. This Court has protected site-specific activities that do not differ in any significant way from the picketing here. E.g. Boos v. Barry, No. 86-803 (March 22, 1988); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. City of Chicago, 394 U.S. 111 (1969).

As the trial court properly held, the town cannot justify this restriction as a reasonable time, place and manner regulation, because it is not sufficiently narrowly tailored to serve either of the two interests posited by the town.

The ordinance is not narrowly tailored to effectively serve public safety concerns because it is not aimed directly at the purported effects of picketing, such as traffic congestion and pedestrian safety, of which the town complains. Instead, it simply prohibits all picketing even where traffic congestion and safety are not remotely an issue. The town's concerns can be addressed through enforcement of criminal laws, which are considerably more narrowly tailored to effectively serve its safety interests.

While privacy is advanced as a justification for the prohibition, the town does not define what it means by "residential privacy." Peaceful picketing in a public forum does not invade or threaten any privacy interests that the town can legitimately protect.

The town concedes it may not constitutionally ban marches and demonstrations from residential neighborhoods. Even if these channels were shown to be adequate, the argument that this leaves ample alternative channels is irrelevant, for the existence of other modes of expression cannot save an ordinance that fails to be narrowly crafted.

In addition, the ordinance is vague. The definition of "picketing" supplied by the town, "standing or patrolling", makes the ordinance more, not less,

problematic. It fails to give fair notice of what conduct is prohibited, and leaves too much discretion in the hands of those charged with its enforcement.

Finally, the ordinance is overbroad in that there is no core of constitutionally unprotected expression to which the ban might be limited.

The district court did not abuse its discretion in finding that the ordinance would likely be held unconstitutional after a trial on the merits. The decision of the Seventh Circuit affirming the trial court was correct.

ARGUMENT

I. THE ORDINANCE IS NOT A REASONABLE TIME, PLACE AND MANNER REGULATION.

A. Peaceful, Public-Issue Picketing in a Public Forum is Protected by the First Amendment.

This case concerns an absolute ban on a traditional form of expression in a quintessential public forum. Both the manner of communication and its location have long been afforded the highest protection by this Court.

The public streets and sidewalks have traditionally been viewed as locations where citizens may freely engage in speech and communicative activities.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the

streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515 (1939).

The Court has described streets and sidewalks as "'public places' historically associated with the free exercise of expressive activities. . . [They] are considered, without more, to be 'public forums.'" United States v. Grace, 461 U.S. 171, 177 (1983). In Grace, the Court held unconstitutional a ban on leafletting and picketing on the public sidewalks abutting Court grounds, stating that those sidewalks "are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated differently." 461 U.S. at 179.

Most recently, in Boos v. Barry, No.

86-803 (March 22, 1988), this Court reiterated that the public streets and sidewalks are traditional public fora, where "the government's ability to restrict expressive activity 'is very limited'." Slip op. at 4, quoting Grace, 461 U.S. at 177.

Public streets and sidewalks are no less public fora because they abut residences or dwellings. In Carey v. Brown, 447 U.S. 455 (1980), this Court held that there could be "no doubt" that a statute "prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods" regulated "expressive conduct that falls within the First Amendment's preserve." Id. at 460. See also Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (peaceful, orderly march through residential neighborhood held "well within the sphere of conduct

protected by the First Amendment.")

It is not by chance that the Brookfield picketers selected the Victoria home, for the site of this picket is an integral part of the expression. The picketers convey their views on abortion not just to Dr. Victoria, but to others as well. Their message is to protest Dr. Victoria's position on the abortion question, and to inform his neighbors that he performs abortions in his medical practice.

This site-specific aspect is often an important part of protected speech. In Carey v. Brown, 447 U.S. at 468 n.13, this Court recognized several types of speech the effectiveness of which depends on the residential setting, citing landlord-tenant, zoning and historic preservation disputes as examples. In Gregory v. City of Chicago, 394 U.S. 111,

marchers walked from City Hall to the mayor's home to protest his stance on school desegregation. (See 394 U.S. at 115-16, Black, J., concurring). The site of the march was critical to the message: a march in some public park or commercial street would not have brought the message "home" to the mayor. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), residents protested "blockbusting" activities of a real estate broker by leafletting the broker's neighborhood, to let "his neighbors know what he was doing to us." Id. at 417. Most recently, the Court held unconstitutional a ban on displaying certain signs near foreign embassies. Boos v. Barry, No. 86-803 (March 22, 1988).

Public issue picketing is a form of expression historically protected by this Court from prior restraint. Thornhill v.

Alabama, 310 U.S. 88 (1940). It "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. at 467. Even when accompanied by singing, the stamping of feet, and the clapping of hands, it is an exercise of First and Fourteenth Amendment rights "in their most pristine and classic form." Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

Accordingly, this peaceful, public issue picketing, in a public site selected especially to "bring the message home," is entitled to the highest protection by this Court. Any attempt to prohibit it should be subjected to the most careful scrutiny. Boos v. Barry, slip op. at 4, citing Grace and Carey.

B. The Ordinance is Not Narrowly Tailored to Effectively Serve the Public Safety.

An absolute ban on a particular form of communication, such as Brookfield's ban on residential picketing, is constitutional only if narrowly drawn to accomplish a compelling governmental interest. United States v. Grace, 461 U.S. at 177. Brookfield asserts a public safety justification for its ordinance, but the statute is not precisely drawn to serve it.

In Schneider v. State, 308 U.S. 147 (1939) a ban on handbilling was challenged as an abridgement of free speech. The municipalities banned the mode of expression because, they claimed, it caused litter. But the litter was not the expression itself, only an otherwise-controllable consequence of it. The appropriate course was to enforce

criminal sanctions against littering, not to restrain the speech. 308 U.S. at 162. The ordinances thus were not narrowly tailored.

In Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), the city banned signs on telephone poles as a means of regulating visual blight. In upholding the ban, the Court stated:

[I]t is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape... In contrast to Schneider, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City.

466 U.S. at 810.

This case more closely resembles Schneider than it does Vincent, for it is not the expression itself which gives rise to potential safety hazards. Rather, to the extent such hazards exist,

they are the possible consequence of the expression, as was the litter in Schneider. Like the Schneider towns, Brookfield's interests can be fully protected by existing criminal law.

While there is no record evidence to suggest that any pedestrian or auto traffic problem actually occurred during the pickets at Dr. Victoria's home, three ways in which picketers might cause public safety problems are advanced in the town's brief. Picketers are claimed to be in danger from passing cars, especially if they park their buses and cars on the street; other pedestrians are endangered because drivers are distracted by the picketers; and automobile traffic is interfered with. (Br. at 31-32.)

The town concedes that it cannot constitutionally bar marches and leafletting campaigns in residential

areas. (Br. at 41-42.) Yet it has not identified how residential picketers could pose a threat to safety in any way greater than that posed by Gregory marchers or Keefe leafletters. Moreover, picketers do not create a hazard to themselves and others any different from that created by groups of children walking home from school or residents who have organized a neighborhood leaf-raking party.

As the district court noted, a number of ordinances are already in place to control the types of safety problems with which the town professes concern, including prohibitions against obstructing the streets and sidewalks and disorderly conduct. See 619 F. Supp. at 794-95.

In invalidating restrictions on speech, this Court has frequently relied on the availability of criminal sanctions to protect state interests. E.g. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637, rehearing denied, 445 U.S. 972 (1980) (laws against fraud could protect against dishonest canvassers); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (state may effectively deal with misleading or deceptive commercial speech without prohibiting advertising). Brookfield has a wide variety of "appropriate public remedies," Kunz v. New York, 340 U.S. 290, 294 (1951), to amply protect its citizens.

In Boos v. Barry, No. 83-803 (March 22, 1988), the Court held that the availability of a criminal statute more

narrowly tailored to the State's concern "amply demonstrate[d]" that the statute in question was "not crafted with sufficient precision to withstand First Amendment scrutiny." Slip op. at 15. At issue was a District of Columbia statute banning the display of signs within 500 feet of a foreign embassy, where the message would bring the foreign government into "disrepute." The Court contrasted that prohibition with a federal statute, applicable outside the District, criminalizing activities that "intimidate, coerce, threaten, or harass" foreign officials. The federal statute was aimed directly at the activity that threatened the government's interest in protecting foreign diplomats. It was "considerably less restrictive" of speech than the District's ban on signs. Slip op. at 12. The Court held that the

District's sign ban was "not narrowly tailored; a less restrictive alternative is readily available." Slip op. at 15.

Each of Brookfield's purported safety concerns may be effectively dealt with by measures "considerably less restrictive," Boos v. Barry, slip op. at 12, than this absolute ban.⁶

Because the ordinance is not precisely drawn to regulate the safety hazards claimed to be caused by residential picketing, the claimed public safety interest cannot justify this ordinance.

C. The Ordinance Does Not Protect Privacy.

The town argues that picketing per

⁶ Some restriction on residential picketing could be narrowly drawn to serve effectively the safety interest. For example, the town may regulate to accommodate competing uses of the forum if more than one group desires to picket at the same location.

se is a privacy invasion: picketing is "uniquely invasive" (br. at 42) and "[e]ven one picket is 'an unacceptable intrusion into the privacy of the person whose home is being picketed'" (br. at 37). Significantly, the town does not identify precisely what it means by the term "residential privacy." It identifies no specific way in which picketing intrudes upon a homeowner or causes any sort of invasion which the town may legitimately protect.⁷

Picketers confine themselves to public property. They do not enter onto the private domain in order to exercise their First Amendment rights. This Court

⁷ To the extent that the noise may be argued to invade privacy, Brookfield's anti-noise ordinance should be sufficient. A narrowly drawn regulation might provide for a different allowable noise level on the public streets and sidewalks after, for example, 9:00 or 10:00 p.m.

has countenanced the entry of solicitors onto private property in the absence of a "no trespassing" sign. See City of Watseka v. Illinois Public Action Council, ___ U.S. ___, 107 S.Ct. 919, rehearing denied, 107 S.Ct. 1389 (1987), aff'g mem., 796 F.2d 1547 (7th Cir. 1986); Martin v. Struthers, 319 U.S. 141 (1943). In contrast, a lone, silent picketer on the public way might well go unnoticed by a homeowner.

The town cannot constitutionally prohibit other First Amendment activities that may have some impact on neighborhood tranquility. For example, this same group of picketers could march en masse through the Black Forest neighborhood, presumably even "around and around" near the Victoria home. Gregory v. City of Chicago, 394 U.S. at 116 (Black, J., concurring). Groups could go door-to-

door speaking with neighbors and leafletting. Organization for a Better Austin v. Keefe, 402 U.S. 415 at 419. Given these protected activities which the town may not ban, Brookfield's failure to identify that which is "uniquely invasive" about picketing means that its restriction on speech can fare no better than did those at issue in Keefe and Gregory.

If a picketer per se invades the homeowner's privacy, then a homeowner could just as reasonably claim a privacy invasion by any passer-by, whether or not engaged in expression.

This Court has recognized the right of persons to be present on the public streets in the context of vagrancy or loitering statutes. While the statutes at issue were invalidated on due process grounds, the impact of such laws on First

Amendment speech and associational rights was noted. In Kolender v. Lawson, 461 U.S. 352 (1983) the Court struck on vagueness grounds a statute allowing a police officer to demand "credible and reliable" identification of a person who wanders the streets, and to demand that the person "account for his presence." Id. at 357. The Court expressed concern for the statute's "'potential for arbitrarily suppressing First Amendment liberties. . . ." In addition, [the statute] implicates consideration of the constitutional right to freedom of movement." Id. at 358 (citations omitted). See also Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (walking and wandering the public streets "are historically part of the amenities of life as we have known them."); Coates v. City of Cincinnati, 402 U.S. 611, 615

association violated by ordinance prohibiting three or more people to "assemble" on the sidewalk and conduct themselves so as to "annoy" passers-by.)

The great variety of activities covered under the "picketing" label shows that picketing per se is not a privacy invasion. For example, friends and neighbors who greet a returning hostage with signs and banners reading "Welcome Home Father Jenco" would likely be warmly received by the homeowner. Yet the greeters would be criminals under Brookfield's ordinance. Similarly, a church youth group could not advertise, by way of holding a banner in front of a member's home, a pancake breakfast or

car-wash.⁸ In sum, this ordinance cannot be justified as a privacy protection device. It bans many activities that have no impact on privacy. At the same time, protected activities that it cannot ban have no different effect on neighborhood residents.

D. The Identified Alternatives to Residential Picketing Cannot Justify this Ordinance.

The burden of establishing the existence of adequate alternative channels of communication for these picketers is on the defendants. Cf. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 n.5

⁸ If the ordinance does not criminalize the activities in these two hypothetical situations, but does criminalize picketing in front of Dr. Victoria's home, the ordinance cannot be claimed to be content-neutral. Its applicability would depend entirely on the content of the message. Cf. Boos v. Barry, No. 86-803 ("The emotive impact of speech on its audience is not a 'secondary effect' that can justify a restriction on speech.") Slip op. at 7.

(1984); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981). At the preliminary injunction hearing, the town failed to come forward with any evidence on this issue. Nevertheless, the picketers did make a showing, sufficient for this preliminary injunction proceeding, that no such channels exist. The affidavit of plaintiff Schultz shows that picketing at the home serves a function that picketing at other locations would not: it conveys the message to the target "and those in his community" and "allows us to reach audiences who might not otherwise receive our messages". (J. A. at 37-38.)

The town suggests two reasons why "ample alternative channels" are available here: the plaintiffs may picket on Brookfield's commercial street, and they may demonstrate or leaflet in the residential areas. (Br. at 41-42.) Neither reason is

sufficient to justify the ban.

Alternative channels of communication must be "ample." Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977). They are not ample if the options to which the speaker realistically is relegated "are less likely to reach persons not deliberately seeking [the] information" or are "less effective media for communicating the message that is conveyed" by the proscribed activity. Id. at 93. Thus, for example, in Linmark, this Court found a township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs violative of the First Amendment in significant measure because the increased difficulty the ordinance added to the

speakers' ability to reach their audience rendered the alternative channels "far from satisfactory." Id.

The often-quoted axiom that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," Schneider v. State, 308 U.S. at 163, has special meaning in the residential picketing context.

This Court has recognized that there are "many sorts of picketing which must be carried out in residential neighborhoods or not at all. Protests arising out of landlord-tenant relationships, zoning disputes, and historic preservation issues are just some of the many demonstrations that bear a direct relation to residential neighborhoods." Carey v. Brown, 447 U.S. at

468 n.13. Access to the neighbors of ultimate targets of protests such as those identified in Carey may be critical to the success or failure of the protest. This was the case in the anti-slum drive of The Woodlawn Organization ("TWO") in Chicago in the 1960s. Tenants would demand that a slum landlord make the necessary repairs in his buildings to make them habitable. After escalated forms of protest,

[i]f the landlord remained recalcitrant, groups of pickets were dispatched to march up and down in front of the landlord's own home, carrying placards that read "Your Neighbor Is A Slumlord." The picketing provided a useful outlet for the anger the tenants felt, and gave them an opportunity, for the first time in their lives, to use their color in an affirmative way. For as soon as the Negro pickets appeared in a white suburban block, the landlord was deluged with phonecalls from angry neighbors demanding that he do something to call the pickets off. Within a matter of hours

landlords who were picketed were on the phone with TWO, agreeing to make repairs.

C. Silberman, *Crisis in Black and White* 330 (1964).

The TWO picketers would be left with no effective alternative site for their protest if the slumlord whose actions they sought to modify lived in Brookfield. The challenged ordinance would deprive them of the opportunity to communicate with the slumlord's neighbors, negate the effectiveness of their protest, and thus deny them the benefits of the First Amendment.

Picketing in residential neighborhoods has no equivalent, not only for reaching neighbors of a protest target, but also when the residence is the only place where the protesters can confront the source of their

discontent. This is true for some labor picketing, such as that by a maid toward an employer. See, e.g., Carey v. Brown, 447 U.S. at 480-81 (1980) (Rehnquist, J., dissenting) (state anti-residential picketing statute's exemption for picketing related to a labor dispute reflects "legitimate interest" in "providing a forum where no other is reasonably available"). It is also true for many tenant protests. See, e.g., Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing, 433 Pa. 578, 252 A.2d 622 (1969) (landlord's residence was proper situs for tenant picketing where landlord conducted business so as to avoid detection). Thus, the fact that plaintiffs may picket elsewhere is not an ample alternative.

Because it cannot constitutionally bar marches and leafletting campaigns, the town points to these as a second set of alterna-

ive channels. (See br. at 41.) While these devices may indeed be means by which individuals can spread their message, their availability cannot save this statute even if they are presumed to be adequate. As shown in the preceeding section, the regulation is not narrowly tailored. The existence of ample alternatives is a necessary requirement for a valid time, place and manner regulation, but that fact alone is insufficient to support its constitutionality.

E. The Ordinance Cannot Be Justified
By Reference To Labor Picketing
Cases.

Amici National League of Cities et al. argue that picketing is subject to stricter governmental regulation than are other forms of protected expression, suggesting that it is inherently coercive and necessarily carries with it a message far different from

the fact of a dispute. (Br. at 18-19.)⁹ The cases cited for that proposition, however, are irrelevant to the peaceful, public-issue picketing in this case.

In NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607 (1980), the Court found that the goal of a picket line, as part of a secondary boycott, was illegal. Justice Stevens' concurrence, upon which amici rely, was not speaking of the effect of peaceful, public-issue picketing. To the contrary, Justice Stevens merely observed that "i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive

⁹ Even if picketing per se were somehow more coercive than other speech, or were always aimed at inducing action, that would not justify treating communication by picketing any differently from other speech. See Boos v. Barry, No. 86-803, slip op. at 8 (adverse emotional impact on listener insufficient to justify punishing the speaker).

deterrent to third persons about to enter a business establishment." 447 U.S. 619. (emphasis supplied.) In Bakery and Pastry Drivers Local 802 v. Wohl, 315 U.S. 769 (1942), the Court specifically declined to enjoin a labor-related picket, because it was otherwise impossible to publicize the grievance, and the picket had only a slight effect on parties neutral to the dispute.¹⁰

The Court in NAACP v. Claiborne Hardware, 458 U.S. 886, rehearing denied, 459 U.S. 898 (1982) declined to extend cases such as Safeco to political picketing.

¹⁰ Amici's remaining authority is Hughes v. Superior Court, 339 U.S. 460 (1950). That decision was based on the fact that the object of the picketing was illegal. The object--hiring of workers in proportion to the racial make-up of the business' clientele--may have been "illegal" in 1950, but it is not now. More importantly, the picketing in that case was virtually identical to the public-issue picketing held to be protected expression in NAACP v. Claiborne Hardware Co., 458 U.S. at 907.

In Claiborne Hardware, a group of blacks organized a broad economic boycott of businesses that violated, through employment and other practices, the civil rights of black residents. The boycott included peaceful picketing, but some acts of violence did occur. The boycotted merchants sought to hold the blacks liable for their economic injury. The Court held the 'boycotters' "peaceful political activity" protected by the First Amendment in spite of a strong state interest in economic regulation. 458 U.S. at 912-13, distinguishing Safeco. The Court stressed the public issue nature of the boycotters' speech, noting that its goal was to force governmental and social change. Id. at 913-15.

The only similarity between the Brookfield and Claiborne Hardware picketers and the picketers who were enjoined in Safeco is

that they all carry their messages on placards. But it is not the form of speech that provides the analytic underpinning in Safeco. Rather, the Court rested its decision in Safeco on its identification of an illegal purpose and economic power behind the picketing. 447 U.S. at 616.

Much like the leafletters in Keefe and Schneider, the Gregory marchers, and the Claiborne Hardware demonstrators, these plaintiffs seek only to bring their message to their audience. Accordingly, cases where this Court has restricted picket lines because they urge unlawful secondary boycotts are simply not applicable to this political, public-issue picketing.

II. THE ORDINANCE IS VOID FOR VAGUENESS.

The ordinance itself does not define "picketing," and the definition supplied by the town for purposes of this litigation

appears to criminalize a far broader range of expressive behavior than one might ordinarily consider to be included in the term. According to the town, to "picket" means to "stand or patrol". (Br. at 41.) The proffered definition increases the confusing nature of the ordinance, rather than clarifying what conduct it prohibits, for it is at odds with what is traditionally viewed as "picketing."

In order to survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," must "provide explicit standards for those who apply" it so as to prevent arbitrary enforcement, and must not "lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of

Rockford, 408 U.S. 104, 108-09 (1972) (footnotes and citations omitted). Vagueness is particularly problematic where, as here, the prohibition abuts constitutionally protected rights. Id., 408 U.S. at 109; Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961). Brookfield's ban on residential picketing fails each of the three vagueness standards and is therefore void.

First, the ordinance fails to provide fair notice of what conduct is prohibited, making it difficult for citizens to know how to conform their conduct to the law's requirements. A group engaged in what is traditionally considered "picketing" -- a line of placard-carriers, for example, warning of a labor dispute -- would clearly be covered by the ordinance. But whether a solitary protester wearing an anti-abortion symbol, walking "around and around" near the

mayor's home (see Gregory, 394 U.S. at 116; Black, J., concurring), would be prohibited as "standing or patrolling" is not clear at all. The statute thus does not provide the fair notice necessary to escape a finding of vagueness.

Second, the ordinance vests its enforcers with unbridled discretion to determine what falls within its prohibition and what does not. The vesting of such unbridled discretion cannot be squared with the constitution. Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965). As is obvious from the supplied definition ("stand or patrol"), a limitless variety of activities could be deemed "picketing" within this ordinance. A resident strolling around the block, perhaps wearing a political button or an armband, may well pass a police officer without being

arrested, as could banner-carrying high school students celebrating a team victory in front of the star player's home. But a group of citizens upset with the mayor's stand on school desegregation, carrying signs or simply marching in a group, may well be charged with "picketing".

Third, the ordinance is so indefinite that it may cause persons to steer clear of engaging in protected expression because of the risk that such expression will be deemed to be prohibited "picketing". The "boundaries of the forbidden areas" are not "clearly marked". Grayned v. City of Rockford, 408 U.S. at 109. It is not possible to tell whether a particular gathering is a permissible march within Gregory v. Chicago, 394 U.S. 111, or a criminal "picket" within the ordinance. Citizens will inevitably forego the exercise of constitutional rights for fear of being

subject to arrest.

This ordinance cannot withstand a vagueness challenge and is therefore void.

III. THE ORDINANCE IS OVERBROAD AND THEREFORE FACIALLY UNCONSTITUTIONAL.

This Court has recognized two kinds of overbreadth. A statute may be "substantially overbroad", constitutional in some of its applications but sweeping too much protected activity within its ban. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). A statute may also regulate so broadly that it is unconstitutional in all its applications. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 966, 968 (1984). It is this latter form of overbreadth from which the Brookfield ordinance suffers. It absolutely bars all picketing "before or about" residences within the town. It does not purport to regulate, for example, to accommodate

competing uses of the public way.

In City of Houston v. Hill, ___ U.S. ___, 107 S.Ct. 2502 (1987), this Court held overbroad a statute prohibiting abusing or interrupting a police officer in the course of an investigation. The statute was a "general prohibition of speech that 'simply ha[d] no core' of constitutionally unprotected expression to which it might be limited." 107 S. Ct. at 2513 (citation omitted). Similarly, there is no "core" of unprotected activity to which this ordinance can constitutionally be applied. It is not susceptible to a limiting construction since all of the activity it prohibits is protected.

Accordingly, the ordinance is invalid in all of its applications, and is therefore unconstitutionally overbroad.

CONCLUSION

At this preliminary injunction phase, the picketers need only show that they have a "reasonable likelihood" of success after trial. The district court's conclusion that the ordinance most likely will be shown to be unconstitutional was correct, as was the Seventh Circuit's affirmance of that conclusion.

Respectfully submitted,

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